

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

OCTOBER TERM, 1950

For the

District of Columbia Circuit

FILED NOV 2 - 1950

No. 10769

Joseph W. Stewart

CLERK

EDWARD S. ERSER,

Appellant,

v.

**T. F. SCHNEIDER CORP., A CORPORATION, AND JAMES
PATRICK LINER,**

Appellees

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

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Statement of Questions Presented

I. Where appellant, a guest of a hotel, suffered injuries by reason of an assault and battery at the hands of an employee of the hotel, and the complaint claimed, among other things, "great and permanent bodily injury," and "great pain of mind and body" and counsel for appellees prior to trial were furnished with a copy of a report of a heart specialist who examined appellant within a month after the injuries were received,

1. Did Court err?

(a) in refusing to permit such witness to testify as to his findings;

(b) in refusing to permit the ~~record~~ made of petitioner's heart ~~in~~ an electrocardiogram by another medical witness to be introduced in evidence and in refusing such other medical witness to testify as to his findings;

(c) in excluding evidence from a lay witness as to appellant's inability to work following his injury when such lay witness had ample opportunity to observe plaintiff before and after he received the injuries complained of?

II. In a civil case for assault and battery, which does not put the defendant's character and reputation in issue,

1. Did Court err in permitting evidence to be introduced by defendant of his reputation for peace, good order, truth and veracity?

III. In a case in which a hotel employee without provocation assaulted a guest of the hotel causing physical injury, was evidence that such employee helped support his mother properly admissible?

IV. Where a hotel employee, without provocation, struck and beat a guest of the hotel, causing personal injury, did court err in ruling that punitive damages did not apply to the proprietor or employee of the hotel?

V. The verdict of the jury was contrary to the evidence, the weight of the evidence and contrary to law.

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**T. F. SCHNEIDER CORP., A CORPORATION, AND JAMES
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Appellees

BRIEF OF APPELLANT

Jurisdictional Statement

This Court has appellate jurisdiction under U.S.C., Title 28, § 1291 and § 1294.

Statement of the Case

This was a suit by a guest of the Cairo Hotel for actual and punitive damages against T. F. Schneider Corporation,

proprietor of the Cairo Hotel, and one Liner, its employee, resulting from a physical assault and battery upon appellant by Liner.

In 1941 appellant came to live at the Cairo Hotel, owned by appellee Schneider Corporation, and in the early hours of March 22, 1948, appellant was in the lobby of this hotel when he was asked by Meder, the night desk clerk, to help him check some figures. Appellant, having nothing to do, was glad to oblige. Meder was in the office inclosure behind the desk and appellant stayed in the lobby outside the enclosure. (App. 11, 23)

While appellant and Meder were checking the figures, appellee Liner, night auditor of the hotel (App. 90) came into the lobby, saw appellant and Meder checking figures, went behind the counter and appeared to give some instructions to Meder, and when Liner seemed to have concluded his business with Meder, appellant picked up a paper again to proceed with the checking, Liner ordered him to put it down, which appellant did, and then Liner leaned across the counter and struck appellant "an awful stinging blow on the right side of the face" and the pipe appellant was smoking was knocked into a far corner and appellant felt dizzy. Then Liner came out from behind the counter (App. 12) and began to strike appellant, who backed away, but Liner grabbed his tie and pulled him toward Liner and struck several blows to appellant's chest or the center of his body. Appellant grabbed Liner's wrist and a bystander pulled Liner away, but Liner retained his grasp on appellant's tie, choking him, and then grabbed appellant's hand and right thumb, twisting the thumb quite severely. A watch appellant was wearing (App. 36) was damaged as a result of the altercation; appellant picked it off the floor, and this watch was received in evidence as Plaintiff's Exhibit No. 1. Appellant then went to his room in the hotel, feeling confused or dizzy.

The beating which appellant received from Liner was severe and vicious. Appellant's arm became stiff (App. 14), pains shot up and down the arm, and his thumb pained him. The fillings in his teeth came out, as did an inlay. The fillings had to be replaced (App. 15) and he went to Dr. Stevenson, who treated him for two or three months. He was sent to Dr. Glenn, a heart specialist, by Dr. Stevenson. He also went to other physicians, but his condition did not improve (App. 16). He did no work (App. 17) since March 22, 1948.

Appellant (App. 35) had difficulty in walking, after he was struck by Liner, and he had pain down his legs.

Appellee Schneider Corporation promptly received notice of the beating (App. 33) but Liner was kept in the corporation's employ until the management of the hotel was transferred away about May 23, 1948 (App. 88).

Appellee Liner admitted (App. 94) that he grabbed hold of appellant, that he grabbed his tie and may have twisted it; that he was pulled from appellant by a bystander; that when he was talking with appellant, appellant had a pipe in his mouth, but afterwards the pipe was gone. Liner offered (App. 96) to pay for damage to appellant's shirt, pipe and watch.

It is appellant's contention that the Court erred (1) in excluding evidence offered by appellant; (2) in admitting evidence of appellee Liner's character, reputation, and reputation for peace, good order, truth and veracity; (3) in ruling that punitive damages could not be awarded; and (4) in permitting appellee Liner to testify that he helped support his mother; (5) and the verdict of the jury was contrary to the evidence, the weight of the evidence, and contrary to law.

Statement of Points

1. ALTHOUGH APPELLANT WAS STRUCK IN THE REGION OF THE HEART, AND THE COMPLAINT ALLEGED PERMANENT BODILY INJURY, THE COURT BELOW ERRED IN EXCLUDING EVIDENCE FROM A HEART SPECIALIST WHO EXAMINED APPELLANT WITHIN A MONTH AFTER HE WAS STRUCK, ALTHOUGH COUNSEL FOR APPELLEES WERE FURNISHED WITH A COPY OF THE PHYSICIAN'S REPORT (APP. 8-9, PLAINTIFF'S EXHIBIT NO. 4 FOR IDENTIFICATION) PRIOR TO TRIAL; AND ERRED IN EXCLUDING A REPORT AND TESTIMONY MADE BY A CARDIOLOGIST.

2. THE COURT ERRED IN REFUSING TO ADMIT THE TESTIMONY OF A LAY WITNESS AS TO APPELLANT'S INABILITY TO WORK FOLLOWING THE BEATING HE RECEIVED.

3. THE COURT ERRED IN ADMITTING EVIDENCE OF APPELLEE LINER'S CHARACTER, REPUTATION, AND REPUTATION FOR PEACE, GOOD ORDER, TRUTH AND VERACITY.

4. THE COURT ERRED IN RULING THAT PUNITIVE DAMAGES DID NOT APPLY TO DEFENDANTS.

5. THE VERDICT OF THE JURY WAS CONTRARY TO THE EVIDENCE, THE WEIGHT OF THE EVIDENCE, AND CONTRARY TO LAW.

Summary of Argument

1. Where appellant, a guest of a hotel, suffered injuries by reason of an assault and battery at the hands of an employee of the hotel, and the complaint claimed, among other things, "great and permanent bodily injury," and "great pain of mind and body" and counsel for appellees prior to trial were furnished with a copy of a report of a heart specialist who examined appellant within a month after the injuries were received, the Court erred in refusing to permit such witness to testify as to his findings made after examining appellant; and the Court likewise erred in refusing to permit another heart specialist who had examined appellant and who made an electrocardiogram of appellant's heart to testify; and also erred in excluding

this electrocardiogram and in excluding evidence of a lay witness, who had ample opportunity to observe appellant relating to appellant's inability to work following his injuries.

2. In a civil case for assault and battery, which does not put the defendant's character and reputation in issue, the court erred in permitting evidence to be introduced by defendant as to his reputation for peace, good order, truth and veracity. The fact that a hotel employee may have a good reputation does not excuse him from liability for beating a guest of the hotel and the parading of character witnesses before the jury may well have led them to believe it did.

3. In a case in which a hotel employee without provocation assaulted a guest of the hotel causing physical injury, evidence that such employee helped support his mother was improper, prejudicial and constituted reversible error.

4. Where a hotel employee, without provocation, struck and beat a guest of the hotel, causing personal injury, the court erred in ruling that punitive damages did not apply to the proprietor or employee of the hotel.

5. The verdict of the jury was contrary to the evidence, the weight of the evidence and contrary to law.

Argument

1. WHERE APPELLANT, A GUEST OF A HOTEL, SUFFERED INJURIES BY REASON OF AN ASSAULT AND BATTERY AT THE HANDS OF AN EMPLOYEE OF THE HOTEL, AND THE COMPLAINT CLAIMED, AMONG OTHER THINGS, "GREAT AND PERMANENT BODILY INJURY," AND "GREAT PAIN OF MIND AND BODY" AND COUNSEL FOR APPELLEES PRIOR TO TRIAL WERE FURNISHED WITH A COPY OF A REPORT OF A HEART SPECIALIST WHO EXAMINED APPELLANT WITHIN A MONTH AFTER THE INJURIES WERE RECEIVED, THE COURT ERRED IN REFUSING TO PERMIT SUCH WITNESS TO TESTIFY AS TO HIS FINDINGS MADE AFTER EXAMINING APPELLANT; AND THE COURT LIKEWISE ERRED IN REFUSING TO PERMIT ANOTHER HEART SPECIALIST WHO HAD EXAMINED APPELLANT AND WHO MADE AN ELECTROCARDIOGRAM OF APPELLANT'S HEART TO TESTIFY; AND ALSO ERRED IN EXCLUDING THIS ELECTROCARDIOGRAM AND IN EXCLUDING EVIDENCE OF A LAY WITNESS, WHO HAD AMPLE OPPORTUNITY TO OBSERVE APPELLANT RELATING TO APPELLANT'S INABILITY TO WORK FOLLOWING HIS INJURIES.

Appellant testified (App. 12) "There were several blows struck to my chest or rather to my center and I called to Mr. Roper to help me * * *."

Paragraph 5 of the complaint filed herein (App. 2) alleges among other things that appellant "suffered great and permanent bodily injury" and "suffered great pain of body and mind."

Appellant was examined by a heart specialist, Dr. Joseph Burton Glenn, on April 21, 1948, within a month from the time he received the injuries. Dr. Glenn's report (plaintiff's exhibit No. 4 for identification) is set forth in the appendix at pages 8 and 9. This report was furnished counsel for appellees prior to trial (App. 53).

This witness stated (App. 52) that he had been a practicing physician almost thirty years specializing in heart and cardiology. He was asked the following question: "Q. Dr. Glenn, your nurse has brought records here from your office. I have this marked as Plaintiff's Exhibit 4, a report with reference to Mr. Ersler. I will ask you if you

would just tell the Court and jury what examination you made of him, the date you made it and what you found."

* * * * *

The Court excluded this testimony (App. 54) whereupon plaintiff offered Exhibit No. 4 for identification as testimony the witness would give if permitted to testify. The court took the position that the allegations of the plaintiff including the phrase "great and permanent bodily injury" did not cover injury to appellant's heart.

Dr. Holtzman, a practicing physician with ten years experience (App. 46), a member of the American Board of Internal Medicine (App. 47), who made an electrocardiogram of patient, produced the electrocardiogram which was offered in evidence. Upon objection the court excluded this electrocardiogram from evidence (App. 50), and the interpretation of it by this witness. The Court stated (App. 50): "The Court does not want to be narrow in construing words of the petition. However, taken in conjunction with the context, the Court does not believe that this connotes the heart condition, "permanent bodily injury" which has a definite connotation toward cases. It means injury not of the nature such as a heart condition. Bodily injury does not include, in the court's view from a practical standpoint, injury of such character as would be included in this heart matter. I do not believe that it would be fair to the defendant at this time to be required to meet a situation like this on which they were not informed."

With reference to this witness's testimony counsel stated that (App. 48) "I expect to show from this testimony that, in view of the electrocardiogram that is in evidence that Dr. Glenn took, that that condition still exists and that, in view of the findings of this electrocardiogram, this condition existed some time prior to March 22, 1948, and eliciting an opinion from the witness as to the effect on such a person

suffering from this condition, whose heart was in this condition.

The Court: When was the electrocardiogram taken?

Mr. Miller: Within a month after this occurrence.

The Court: It was taken April 21. This altercation was March 22."

The foregoing ruling of the court below, excluding the testimony of doctors Glenn and Holtzman was clearly prejudicial error and should be reversed by this court.

In the case of *Elgin, A & S Traction Co. v. Wilson*, 75 N.E. 436, 217 Ill. 47, the Court held that the body is the entire physical part of a man.

The case of *Jenkins v. Northern Pacific R. Co.*, 44 Mont. 295, 119 P. 794, held that where the plaintiff alleged that she was injured and bruised upon "her right ankle" "and body," it was proper for her to prove injury to her uterus. Quoting from the case: "Plaintiff alleged in her complaint that she was 'injured and bruised upon her right ankle, leg, hip and body.' She was allowed to prove, over objection, that she had suffered an injury to her uterus. We find no error in this. *The word 'body' comprehends all portions of the body, inside and outside, and the general term employed advised the defendant that she would prove injuries to portions of her body other than her ankle, leg, and hip.* * * * A general allegation of bodily injury is sufficient to warrant a trial court in receiving evidence of any injury to the person, in the absence of a special demurrer or demand for a bill of particulars. * * *"
(Italics supplied.)

In the case of *Quirk v. Siegel-Cooper Co.*, 60 N. Y. S. 228, 43 App. Div. 464, the complaint alleged that the "plaintiff sustained serious and painful internal and other bodily injuries." Over objection the trial court admitted evidence of injury of eyesight. The defendant contended that bodily

injury meant injury to the trunk or main part of the human form. The Court summarily disposed of this argument, and held that evidence of injury of eyesight was properly admitted.

In the case of *Sabol v. Chicago & N. W. Ry. Co.*, 255 Mich. 548, 238 N. W. 281 (cert. den. 284 U. S. 688, 76 L. Ed. 581) the declaration alleged injury to the back and nervous system, but made no mention of injuries to kidneys and heart. Evidence of injuries to kidneys and heart held properly admitted.

In the case of *Montgomery v. Lansing City Elec. Co.*, 103 Mich. 46, 61 N. W. 543, 29 LRA 287, plaintiff did not allege injury to lungs, but was held within his rights to prove such injury.

In the case of *Denver & Rio Grande Ry. v. Harris*, 122 U. S. 597, 30 L. Ed. 1146, it was held that although the declaration did not claim that the injury caused impotency, the trial court properly instructed the jury that such impotency, if caused by defendant's wrong, might be considered in estimating any compensatory damages to which plaintiff might be found entitled.

In the case of *Wade v. LeRoy*, 20 How. 34, 15 L. Ed. 813, the declaration charged that plaintiff was wounded on the head by a blow, in consequence of which his brain was affected and injured so that his understanding and memory were impaired, and before recovery he suffered much mental and bodily pain, and that he had been hindered and prevented from transacting and attending to his necessary and lawful affairs and was deprived of great gains, profits and advantages which he otherwise might have derived and acquired. At the trial plaintiff offered to prove, by a physician, that he could not safely attend to any business or occupation and the witness deemed it imprudent and indiscreet for him to thenceforth devote

himself to any business. To this evidence the defendant objected on the ground that the declaration did not contain any specification of such business or of its nature or extent or that plaintiff was obliged or did relinquish or abandon the same. The Supreme Court stated (at 20 How. 44, 15 L. Ed. 815):

“* * * if the evidence tends to support any issue between the parties, or has a direct connection with other evidence competent to maintain the averments of the declaration, either to illustrate its meaning or to ascertain its probative effect, it cannot be rejected as impertinent, or as founded upon matter that does not appear in the pleadings of the cause. * * *

“This evidence would certainly assist a jury to determine that the plaintiff had sustained an injury of no slight character—an injury to his person, and which was followed by expense, suffering, and loss of time, which had for him a pecuniary value.”

“Although an item of loss may not be recoverable as such because not pleaded, evidence of it may nevertheless sometimes be introduced to prove the extent of general damage.” (Restatement of the Law of Torts, paragraph 904, page 902.)

“‘Bodily harm’ is any impairment of physical condition of the body, including illness or physical pain.” (Restatement of the Law of Torts, paragraph 905(d), page 543.)

This Court, in the days of strict pleading, in the case of *Washington, etc. Ry. vs. LaFourcade*, 48 App. D. C. 364, 47 W. L. R. 87, held that the proof need only substantially correspond with the allegations. And the present rules do not require the specificity required by the rules in force at the time of the *LaFourcade* case.

It follows, therefore, that the trial court was wrong, as a matter of law, in refusing to allow proof of the condition

of appellant's heart as found by the cardiologists a month after the beating and the day before the trial. The weight of such evidence, of course, would have been for the jury; but the jury should have an opportunity to weigh it, and it was reversible error to exclude this evidence.

Charles W. Ashe, a witness produced by appellant, testified that he also was a guest at the Cairo Hotel and would see appellant at least once a day for two or three hours since March, 1948, and had known him for about ten years, and had noticed a definite change in his demeanor, appearance and mannerisms after March 22, 1948 (App. 37). He was then asked this question (App. 38):

"Q. Based upon your observation of Mr. Ersler, as you testified to here today, were you able to form an opinion as to whether or not he was able or unable to work since that time?"

The Court sustained an objection to this question, after the Court's attention had been called to the decision of this Court in *United States v. Woltman*, 61 App. D. C. 52, 57 F. (2d) 418. In that case this Court established the propriety and admissibility of this type of evidence, and the trial court committed error in excluding it. From that case:

"The other assignments relate to the evidence of certain nonprofessional witnesses who were permitted to express an opinion as to the ability of insured to follow a gainful occupation. The evidence shows the witnesses were in a particularly favorable position to observe insured and got their knowledge of his inability to work from conditions which were visible to an ordinary intelligent observer and which were not of that character requiring professional diagnosis. It is always proper to permit a nonprofessional witness, who has had opportunity to observe a sick or injured person, to express an opinion with respect to

whether such a person is helpless or unable to work. The value of the opinion depends, of course, upon the intelligence of the witness and his opportunity to know of the condition as to which he testifies and the ordinary effect of such a condition. In this case the groundwork was sufficiently laid, and we think the evidence was properly received."

In the case of *Chicago & N. W. Ry. Co. v. Green*, 164 F. (2d) 55, (C. C. A. 8), a railroad brakeman, who had worked with plaintiff (also a brakeman) after the accident, testified that plaintiff appeared to be in great pain when he was out on his run, and the lower court refused to strike this testimony as conclusionary. The Circuit Court of Appeals agreed with the lower court, saying: "It is competent for any witness to testify from observation that a person appeared to be in pain."

2 IN A CIVIL CASE FOR ASSAULT AND BATTERY, WHICH DOES NOT PUT THE DEFENDANT'S CHARACTER AND REPUTATION IN ISSUE, THE COURT ERRED IN PERMITTING EVIDENCE TO BE INTRODUCED BY DEFENDANT AS TO HIS REPUTATION FOR PEACE, GOOD ORDER, TRUTH AND VERACITY. THE FACT THAT A HOTEL EMPLOYEE MAY HAVE A GOOD REPUTATION DOES NOT EXCUSE HIM FROM LIABILITY FOR BEATING A GUEST OF THE HOTEL AND THE PARADING OF CHARACTER WITNESSES BEFORE THE JURY MAY WELL HAVE LED THEM TO BELIEVE IT DID.

Over objection, witnesses Pilcher (App. 103) and McPherson (App. 105) were permitted to testify to appellee Liner's character and reputation for peace, good order, truth and veracity.

In the civil case for assault and battery, which does not put the defendant's character and reputation in issue, such testimony is universally held inadmissible. It is especially out of place here where it is in effect admitted that the beating took place.

The character or reputation of appellee Liner was not in issue, and evidence of the character here admitted by the

Court relating thereto was not admissible (Ann. Cas. 1914 B, 881) *Fahey v. Crotty*, 63 Mich. 383, 29 N.W. 876, 6 Am. St. Rep. 305; *Rittenhoffer v. Cutter*, 83 N. J. L. 613, 83 A. 873, Ann. Cas. 1914B, 880; *Porter v. Seiler*, 23 Pa. 424, 62 Am. Dec. 341; *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156. Annotation: Ann. Cas. 1914B 882. *Smithwick v. Ward*, 52 N.C. 64, 75 Am. Dec. 453.

It is not competent to give evidence of the general character of the parties to a cause or of particular facts not in issue, with a view to raising a presumption favorable to a party or unfavorable to his adversary. 4 Am. Jur. 207, and cases cited therein under footnote 4.

In the District of Columbia *Boyle v. Smith* (Mun. App.), 64 A. (2d) 428 holds that such evidence is inadmissible, and supports its opinion with worthy citations, but says that, in view of the large amount of testimony supporting the plaintiff on the main issues, "this evidence could hardly have tipped the scales adversely to defendant."

In the instant case, however, such evidence could well have tipped the scales adversely to plaintiff. That the jury could find for defendants in spite of Liner's own admission justifies the conclusion that evidence of this type may have been the determining factor in producing the verdict that was rendered. Having a good reputation does not excuse persons from liability for beating others, but the parading of character evidence before this jury may well have led them to think it did. Therefore the introduction of the evidence was prejudicial and reversible error.

3. IN A CASE IN WHICH A HOTEL EMPLOYEE WITHOUT PROVOCATION ASSAULTED A GUEST OF THE HOTEL CAUSING PHYSICAL INJURY, EVIDENCE THAT SUCH EMPLOYEE HELPED SUPPORT HIS MOTHER WAS IMPROPER, PREJUDICIAL AND CONSTITUTED REVERSIBLE ERROR.

The trial court, over plaintiff's objection, admitted evidence that Liner helped support his mother (App. 90) and

it is significant that such evidence was introduced in the very beginning of Liner's case. It could not have been introduced for any other purpose than to elicit the jury's sympathies, and could not have had any other effect. That it was improper is well settled in this jurisdiction, *Traver v. Smolik*, 43 App. D.C. 150 (43 W.L.R. 116), in which the Court said:

“Undoubtedly it was error to instruct the jury that the pecuniary circumstances of defendant could be considered in assessing compensatory damages.”

4. WHERE A HOTEL EMPLOYEE, WITHOUT PROVOCATION, STRUCK AND BEAT A GUEST OF THE HOTEL, CAUSING PERSONAL INJURY, THE COURT ERRED IN RULING THAT PUNITIVE DAMAGES DID NOT APPLY TO THE PROPRIETOR OR EMPLOYEE OF THE HOTEL.

At the time of argument of the Motion for Directed Verdict, the Court stated (Tr. 172):

“The second point that I wish to make is certainly, as far as his claim for punitive damages is concerned, the law is well settled that the corporation cannot be liable for that and our Court of Appeals has decided that unless the act is directed by the employer himself, he cannot be liable for punitive damages. There is a claim for punitive damages in this case. I think now is the time to eliminate that.”

In instructing the jury (Tr. 316) the Court stated:

“The damages, in such a case as this,—if you find for the plaintiff—, must be in such amount as will, in your judgment, fairly, fully and reasonably compensate the plaintiff for any personal injuries which may be found by you to have been suffered by him,—no less and no more than that amount.”

The attack made by Liner upon appellant could hardly be characterized as other than wanton and brutal. Appel-

lant, in the lobby of the hotel in which he was a guest, put down the paper he was holding when demanded by Liner. At the time of the attack Liner was acting for the hotel. To maintain that he was acting for the hotel in instructing Meder, but for himself when he beat plaintiff, would be straining credulity beyond the breaking point.

It is settled that punitive damages are recoverable against corporations in the District of Columbia, *Wardman-Justice Motors, Inc. v. Petrie*, 59 App. D. C. 262, 39 F. (2d) 512, from which the following is quoted:

“* * * it is settled law that corporations may incur liability for exemplary damages as well as private persons. To hold a corporation liable, it must appear that the trespass was committed by a servant acting within the scope of his employment, and that the servant's act was either authorized or ratified by officers of the corporation having authority to speak for it. * * *

“The law relative to the assessment of punitive damages in this District is not different from the general Federal rule. In *Washington Post v. O'Donnell*, 43 App. D. C. 215, 43 W.L.R. 146, where a verdict and judgment for \$10,000 was awarded, and it was contended that, in the absence of any showing of actual damage, the judgment could not be sustained as to punitive damage, the court said: ‘There are a few authorities that support the proposition of the appellants, but the great weight of authority is against it. Punitive damages being given by way of punishment, there is no reason to hold that there must be actual damage, or something more than nominal damage, to justify their imposition. Punitive damages depend not upon the amount of actual damage, but upon the intent with which the wrong was done.’ And in *American Home Insurance Company v. Cerrone*, 43 App. D.C. 508, 43 W.L.R. 309, the court, on the authority of the O'Donnell case, held that it is not necessary that there should be actual damages as a foundation for the recovery of exemplary damages.”

5. THE VERDICT OF THE JURY WAS CONTRARY TO THE EVIDENCE, THE WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW.

We have here a case in which a guest of a hotel, entitled to exceptional consideration as a matter of law, is asked by the night clerk of the hotel to assist him, and the guest does assist him, and is doing some free work for the benefit of the hotel when a superior employee, Liner, comes upon the scene, directs the night clerk not to allow the guest to do any more work for the hotel, directs the guest to desist from helping the night clerk, and punctuates his order with a vicious beating of the guest.

The beating is not only proved, but is admitted. There was no room for the jury to speculate whether the beating actually took place. Liner did not attempt by his testimony to show that he struck appellant in self-defense.

Appellant claims to have incurred a heart injury, but is not allowed to prove it.

The corporation retained Liner after notice of the beating, but the court would not grant an instruction as to punitive damages.

But evidence is allowed into the case, over objection, to show that Liner is a good fellow, is a wounded veteran, and helps support his mother, and the jury finds for Liner. They could hardly find against the hotel if they found for Liner.

On what conceivable hypothesis could their verdict be based, except sympathy for Liner?

Conclusion

Wherefore, appellant prays that judgment of the District Court be reversed and a new trial ordered.

Respectfully submitted,

WARREN E. MILLER,
910 17th Street, N. W.,
Washington, D. C.,
Attorney for Appellant.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 2523-'48

EDWARD S. ERSLER, 1615 Que Street, N. W., Washington 9,
D. C., Plaintiff,

vs.

T. F. SCHNEIDER CORPORATION, a Corporation, 811—15th
Street, N. W., Washington 5, D. C. and "Red" Liner, The
Cairo Hotel, 1615 Que Street, N. W., Washington, D. C.,
Defendants

COMPLAINT

(Assault—Punitive Damages)

The complaint of Edward S. Ersler respectfully shows to
the Court as follows:

1. Plaintiff is an adult citizen of the United States and a
resident of the District of Columbia.

2. Defendant T. F. Schneider Corporation is a corpora-
tion authorized to do business in the District of Columbia;
defendant Liner is, to the best of plaintiff's knowledge and
belief, a citizen of the United States and a resident of the
State of Virginia and employed by the defendant corpora-
tion in the District of Columbia as assistant hotel manager
and clerk.

3. The matter in controversy exceeds three thousand dol-
lars (\$3000.00), exclusive of interest and costs.

323 4. Plaintiff is, and has been for several years past,
a resident and guest of the Cairo Hotel, an apartment
hotel owned and operated by the defendant corporation as
an innkeeper, and as such innkeeper defendant corporation
and its agents, servants and employees owed the duty to

plaintiff to protect and shield him from annoyance, embarrassment or harm resulting from the acts or omissions of defendant corporation's agents, servants and/or employees. Nevertheless, in complete disregard of the duty aforesaid, on, to wit, the 22nd day of March, 1948, in the early morning hours, while plaintiff was standing in the lobby of the Cairo Hotel, aforesaid, the defendant Liner, then an agent, servant, and/or employee of the defendant corporation, without cause or justification attacked, assaulted and man-handled plaintiff in a violent, malicious and unlawful manner, wrenching plaintiff's pipe from his mouth, grasping plaintiff's clothes and twisting his arm and wrist and otherwise mistreating plaintiff.

5. As a result of the unlawful and malicious conduct of defendant corporation's agent, servant and/or employee plaintiff suffered severe injuries to his mouth and teeth, had his pipe destroyed, his clothing torn and damaged and suffered great and permanent bodily injury and has been embarrassed and humiliated before the other guests of said hotel, and has suffered great damage to his reputation. As a further result of said conduct, plaintiff was unable to transact his business affairs properly, suffered great pain of body and mind and incurred medical and other expenses in excess of approximately one thousand dollars (\$1,000.00).

Wherefore, the premises considered, plaintiff prays:

1. That he be awarded judgment against the defendants, and each of them, in the sum of twenty thousand dollars (\$20,000.00) actual damages and five thousand dollars (\$5,000.00) punitive damages, together with interest and costs.

2. And for such other and further relief as to the Court may seem just and proper.

EDWARD S. EBSLER.

• • • • •

325 Filed Jul. 8, 1948. Harry M. Hull, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 2523-48

EDWARD S. ERSLER, 1615 Que Street, N. W., Washington 9,
D. C., Plaintiff,

vs.

T. F. SCHNEIDER CORPORATION, a Corporation, 811 15th
Street Northwest, Washington 5, D. C., and "Red" Liner,
The Cairo Hotel, 1615 Que Street, Northwest, Washing-
ton, D. C., Defendants

ANSWER

1. The defendant T. F. Schneider Corporation admits the
allegations of paragraph one.

2. This defendant admits the allegations of paragraph
two of the Complaint except as to the allegation that the
defendant Liner is employed by this defendant which allega-
tion is denied; the defendant Liner is not now employed by
this defendant in any capacity.

3. Answering paragraph four, this defendant admits that
the plaintiff is and has for some time past been a guest of
the Cairo Hotel operated by this defendant, all other allega-
tions of said paragraph four are denied.

Further answering said paragraph four, this defendant
says that at the time of the happening of the alleged assault
the defendant Liner was not on duty, was not acting as
servant, agent or employee of this defendant, as alleged;
that defendant Liner was acting without authority and out-
side the scope of his employment by this defendant.

326 4. This defendant does not have sufficient knowl-
edge of the allegations of paragraph five and there-
fore neither admits nor denies them.

ALBERT E. BRAULT,
Attorney for defendant T. F. Schneider Corp.,
801 Transportation Building.

Certificate of Service

I certify that a copy of the foregoing Answer was mailed, postage prepaid, to C. Walter Harris, Bond Building, Washington 5, D. C., attorney for plaintiff, on this 8th day of July, 1948.

ALBERT E. BRAULT,
*Attorney for T. F. Schneider Corp.,
801 Transportation Building.*

327 Filed Oct. 11, 1948. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2523-48

EDWARD S. EBSLER, Plaintiff,

vs.

T. F. SCHNEIDER CORPORATION, a Corporation, 811 15th St., N. W., and Red Liner, The Cairo Hotel, 1615 Que St., N. W., Defendants

ANSWER TO COMPLAINT BY RED LINER, DEFENDANT

The answer to the Complaint by the defendant, Red Liner, respectfully shows to the Court as follows:

1. The Complaint fails to state a cause of action upon which relief can be granted.
2. The defendant denies the material allegations of the Complaint and further denies that he, without cause or justification, attacked, assaulted and man-handled the plaintiff in a violent, malicious and unlawful manner; that he has no information as to the alleged damage and injury claimed by the plaintiff and demands strict proof thereof.
3. Defendant further alleges that if any attack or assault did occur, the same was provoked by the plaintiff and that

any acts on the part of the defendant were done in self-defense.

ALBERT BRICK,
Attorney for Defendant, Red Liner,
517 Denrike Building.

Copy of the foregoing mailed this 7th day of October, 1948, to C. Walter Harris, Esq., Attorney for Plaintiff, Washington Building, Washington, D. C., and T. F. Schneider Corporation, 811 15th Street, N. W.

ALBERT BRICK.

328 Filed Jan. 26, 1950. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Calendar No. —

Civil Action No. 2523-48

EDWARD S. ERSLEE, Plaintiff,

VS.

T. F. SCHNEIDER CORPORATION and "RED" LINER, The Cairo
Hotel, Defendants

PRETRIAL PROCEEDINGS

Statement of Nature of Case:

Suit for assault and battery, claiming compensatory and also punitive damages. Plaintiff claims that while he was assisting a night clerk employed by defendant corporation at the Cairo Hotel, at the request of the night clerk, he was assaulted by the Defendant Liner, who is employed by defendant corporation, causing plaintiff injuries.

Permanent injuries claimed to the nerves.

Defendant corporation claims that time of occurrence of acts relied on by plaintiff, defendant Liner, while in employment of defendant as a desk clerk, was off duty and was not engaged in any business of defendant.

Defendant Liner maintains that he was not guilty of assaulting plaintiff but that following an argument between plaintiff and him, said defendant Liner sought to defend himself against violence of plaintiff.

Plaintiff is given leave to amend his complaint so as to include claim for personal injuries and to increase the amount of his suit to \$25000.00, said amendment to be made with interlineations within five days.

Defendant corporation at the pre-trial moves to strike any claim against it for punitive damages. Said motion overruled, without prejudice to renewal to trial court.

Plaintiff agrees to submit to medical examination by representative of defendant within 10 days. Plaintiff's counsel to receive copy of report immediately upon receipt by plaintiff.

Parties will exchange names and addresses of witnesses within 10 days from this date.

Within 15 days plaintiff will submit to defendant late report as to plaintiff's medical condition.

C. WALTER HARRIS,
Atty. for Pltff.
BOLITHA J. LAWS,
Judge.

ALBERT BRICK,
Atty. for Red Liner.
A. E. BRAULT,
Atty. for T. F. Schneider Corp.

• • • • •

355 Filed Aug. 8, 1950. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Civil Action No. 2523-48

EDWARD S. ERSLER, Plaintiff,

vs.

T. F. SCHNEIDER CORP., a Corporation, and JAMES PATRICK
LINER, Defendants

STATEMENT OF POINTS ON WHICH PLAINTIFF INTENDS
TO RELY

Comes now plaintiff, by counsel, and gives the following
Statement of Points, pursuant to Rule 75(d), Federal Rules
of Civil Procedure:

1. The Court erred in excluding evidence offered by
plaintiff;

2. The Court erred in admitting evidence of defendant
Liner's character, reputation, and reputation for peace,
good order, truth and veracity;

3. The Court erred in ruling that punitive damages did
not apply to the defendants;

4. The Court erred in permitting the defendant Liner to
testify that he helped support his mother;

5. The verdict of the jury was contrary to the evidence;
and was also contrary to the weight of the evidence, and con-
trary to law.

WARREN E. MILLER,
910 17th Street N. W.,
Washington, D. C.,
Attorney for Plaintiff.

Service of a copy of the foregoing Statement of Points
acknowledged this 7th day of August, 1950.

ALBERT E. BRAULT,
*Transportation Bldg.,
Washington, D. C.,
Attorney for Defendant,
T. F. Schneider Corp.*

ALBERT BRICK,
*1010 Vermont Ave, N. W.,
Washington, D. C.,
Attorney for Defendant,
James Patrick Liner.*

356 Filed Aug. 25, 1950. Harry M. Hull, Clerk

Plfs. Ex. #4 for id.

C.A. 2523-48

JOSEPH BURTON GLENN, M.D.

2015 Que Street, Northwest

Washington 9, D. C.

April 21, 1948.

MY DEAR LELAND;

The following is a report on the heart examination in
the case of Mr. Edward Ersler;

Blood-pressure—systolic 120—diastolic 78.

Physical examination of the heart—The sounds are faint,
but the chest wall is thick. No murmurs are heard. There
is no cyanosis nor dyspnoea noted. There is no enlarge-
ment of the liver, and no rales at either lung base to suggest
early failure.

Electrocardiogram—Rate 84. Rythm; sinus, regular.
 P wave notched in 2.
 QS in 3 and AVF.
 P-R interval .18 seconds. (normal).
 QRS interval .08 seconds. (normal).
 S-T junctions and segments on their
 reference levels.
 QRS diphasic and slurred in lead 2.
 QRS slurred in 3.
 T wave normal.
 Voltage normal.
 Axis shift to the left.
 Heart strain—left.

Summary. 1. Myocardial damage.

2. Left heart strain, first or early type.

Plate of the chest—The left ventricle looks large, which may account for the left strain pattern in the cardiogram. However, by actual measurement, with the Nomogram System of Heart Measurement used here in the office, the heart is only 5% enlarged, and you do not call a heart enlarged under 10%. The ascending aorta is more prominent than normal for a man of his age. The lung fields look clear.

Urine and blood done by your office.

Discussion—In view of the X-ray findings, we do not feel that the electrocardiographic tracing is so bad, but it is definitely not normal. We see no evidence of myocardial infarction, but do not like a Q in both lead 3 and lead AVF.

S

We suggest you let us repeat the tracing in three weeks.
 Thanks for letting us see Mr. Ersler.

J. B. GLENN, M. D.

BG/mm/S.F.

• • • • •

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA
CIRCUIT

No. 10769

EDWARD S. ERSLER, Appellant

vs.

T. F. SCHNEIDER CORPORATION, JAMES PATRICK LINER,
Appellees

Plaintiff testified as follows:

4 Direct examination.

By Mr. Miller:

Q. State your name, residence and occupation, Mr. Ersler.

A. My name is Edward S. Ersler. I am living at the Cairo Hotel, 1615 Q Street. Pardon me, sir, what else did you ask?

Q. What is your occupation?

A. My occupation?

Q. What are you trained as?

A. I am trained as a mechanical engineer and my occupation, since leaving school, has been in some phase of mechanical or industrial engineering.

5 Q. * * * Inviting your attention to the early morning of the 22nd of March, 1948, what did you do, say, the night of the 21st, Sunday night?

A. I went to bed real early. I was awakened around midnight and felt a little hungry. I went out to get something to eat at the Thomas Circle drug store, People's Drug Store on Thomas Circle. I ate quite liberally there, came back smoking a cigar and switched to a pipe; got in the lobby and saw Mr. Meder there.

Q. How long had you been living at the hotel there, approximately?

A. I had been living at the hotel since sometime in 1941.

Q. A period of about eight years. What occurred after you returned to the hotel in the early morning of March 22?

A. I may say, chronologically, I passed the time of the day with the clerk and there was another guest who came in and he talked for a few minutes there and, having just eaten, why I sat down at the newspaper stand bench there and was puffing on my pipe and Mr. Meder, who was desk clerk there, was doing some figuring at the desk and he had a long adding machine list in his hand and he said, "Say, Mr. Ersler, if you are not doing anything here a second, can't you give me a hand; hold this and assist me in checking this off. I want to get going."

6 I said, "Yes, I will be pleased to."

I believe we were half way down that long adding machine list when Mr. Liner and Mr. Roper and a Mr. O'Day came off the elevator and, naturally, there was quite a good deal of disturbance there because it was very quiet and anybody talking loud, it would be magnified due to the stillness.

I put the adding machine slip down and there was consultation between Mr. Meder and Mr. Liner——

* * * he was giving him instructions or something behind there and whispering. I didn't know what it was all about and didn't care. Then Mr. Liner left and got on the outside and stood there and Mr. Roper was singing a little and feeling pretty good, noisy and what not and waiting there for quite some time.

7 A. * * * Twenty minutes passed by, fifteen or twenty minutes passed by and I picked up the adding machine list once more to proceed and Mr. Liner appeared right opposite me around the desk and he said, "Put that down", and I did——

Q. Tell us what happened.

A. All right. Then I said, "Aw, Red". I put the paper down and then he leaned across the counter and I don't know what happened but my pipe flew into the far corner and I had an awful stinging blow on the right side of my

face and I don't know—I felt a little dizzy or something like that.

I stepped back there and Mr. Liner came dashing around the counter there and the first thing I heard him say was, "Well, come on outside. I have been looking for this opportunity for a long time". He went and lunged at me and began to hit me. I backed away and he grabbed my tie and pulled me toward him. I don't know. There were several blows struck to my chest or rather to my center and I called

8 to Mr. Roper to help me, assist me there. I didn't want to touch Mr. Liner. I grabbed hold of his wrist to prevent him striking me any further and Mr. Roper grabbed hold of Mr. Liner with what is termed, I believe, a "full Nelson". He had his arms around his neck and he began to bob him up and down and he pulled him away and he grabbed me too.

Mr. Liner had a very strong grasp on my tie and he was choking me further and finally Mr. Roper, who is a very strong man, I believe, for Mr. Liner was up in the air a few times and he finally got him away and I staggered into the elevator which was down there on the main floor. The elevator man was standing next to the elevator and I wanted to go up and Mr. Liner made a lunge for the elevator, ran inside or I mean stepped over the threshold of the elevator. It is a small elevator and he grabbed hold of my hand and thumb, my right thumb and attempted to pull me out of the elevator and twisted it quite severely and Mr. Roper came after him again and said, "Red, are you crazy? Leave him alone."

Finally, the elevator boy came in and took me upstairs. When I went upstairs was thoroughly—well, I was kind of confused or dizzy, what you want. It never happened to me practically all my life since I was a little boy.

I laid down for about half an hour—I don't know how long—then I began to get my breath back and I called downstairs and said, "Please get me the police." Mr. Meder was on the phone——

9 Q. Did any police come up?

A. No.

Q. What occurred next?

A. Well, I wasn't able to go to sleep until when the morning broke and——

Q. What do you mean by "the morning broke"?

A. When it was light outside for several hours and finally, I went to sleep.

I had an appointment which was very important to me that morning and I could not make it. I mean I was exhausted or whatever you want to call it, shock or I don't know what the proper term would be but I was not feeling well.

10 Q. What kind of an appointment was that you had?

A. I had an appointment with the Office of the Undersecretary of War, Colonel Heiss of Ordnance.

Mr. Brick: If Your Honor please, could we get the full name of this Colonel Heiss he is talking about?

The Court: Yes.

The Witness: H-e-i-s-s, Ordnance.

Mr. Brick: What is his first name and middle name?

The Witness: I don't know, sir.

By Mr. Miller:

Q. What was his job?

A. He was the, I believe, they called him in the War Department the Military Chief in the Undersecretary of War's Office. He was interested in supply matters, G-4.

Q. Had you previously worked there and had an acquaintance with him?

A. I had a previous acquaintance with Colonel Heiss in 1943 when he was the well, I don't know. My mind slips right now. His office was the Assistant to the Chief of Field Service in the Ordnance Department. I believe they call them Aides or something. I don't know what the terminology is now.

11 By Mr. Miller:

Q. How long had you worked, approximately, with Mr. Heiss or under him?

A. I worked in Colonel Heiss' department from 1941 until 1943. I am not accurate to my years.

By Mr. Miller:

Q. What was the reason for your going down there?

A. The purpose of my visit there was to qualify for a job which I knew was open under him.

Q. Did you ever go for that job? Did you ever get that job or do anything further about getting it?

A. No, sir.

Q. Why?

12 A. Didn't appear at the right time.

Q. Mr. Ersler, following this occurrence in the early morning of the 22nd of March, 1948, did you have any pain or results of this altercation?

13 A. Well, I did have. I had a slight pain but felt that I was old an enough man that a little pain could not hurt me any. I felt a little confused there for a few days, dizzy, but sort of ashamed of it.

Q. Sort of what?

A. I was ashamed of it.

Q. About when did you go to the doctor after that, do you remember?

A. I don't recall but it was several weeks. I had some difficulty with my teeth shortly thereafter and it had been suggested by friends, acquaintances and others that I go to the doctor. I felt the trouble would clear up but it didn't and I went to one.

Q. What trouble was it that made you go to the doctor?

A. Well my arm became stiff. It had the feeling of being entirely stiff and pains were shooting up and down the arm and I felt that the bone probably had been broken or something like that and the thumb, the ligaments torn or something in the thumb.

Q. Do you recall about when it was that you went to the dentist, and the reason for it?

A. Well, I would say about a week or ten days. The fillings in my teeth came out, particularly an inlay that I had came out.

Q. How soon did they come out after this occurrence on the 22nd of March, or come loose?

14 A. I would say—I don't exactly recall—four or five days perhaps, maybe a little longer.

Q. Had they been in there very long?

A. I believe it was in there for about maybe a year, not quite a year. My recollection is a little vague on it.

Q. And what did the dentist do when you went to him? Who was the dentist, by the way?

A. The dentist was Dr. T. L. McDonald who put the work in.

Q. He repaired your fillings, is that it?

A. Yes, sir. He had to replace them.

15 Q. Tell us in your own words how you felt.

A. First, I went to Dr. Stevenson and he treated me.

Q. What did his treatments consist of?

A. Injection of medicine and medication, diathermy, heat treatments and he took various tests and this extended over a period of about two months, three months or two months, I believe.

Q. Do you remember about how many times you went to see him?

A. Well, it was more than fifteen and maybe around twenty or a little less. I don't know. I was told to come back each time.

Q. Did you seem to be getting any better? Did you feel any better after going there for a couple of months?

A. No, I didn't.

Q. What did you do?

A. I was told they couldn't do much for me.

Q. What did you do?

A. Then I went to Dr. Verbrycke because my bowels had not moved for about ten days or so and I had a series of treatments under Dr. Verbrycke; a complete physical
16 checkup, a series of treatments extending for some time.

Q. Did Dr. Stevenson send you to another doctor?

Mr. Brick: If Your Honor please, I think this witness can tell his own story. That is leading him too much.

The Court: He can answer that question.

The Witness: Yes; he sent me to Dr. Glenn, a heart specialist.

By Mr. Miller:

Q. All right. What other treatment did you receive or what other doctors do you recall that you saw?

A. Well, I went to Chicago—I had reason to go to Chicago. I lived in the Middle West and, in Chicago, I consulted with an old acquaintance of mine, a physician, by the name of Dr. Edward Sideman who I knew from high school days and he took me to the Billings Hospital for a checkup with the facilities there——

By Mr. Miller:

Q. Then did you have occasion to see other doctors?

17 A. Yes, sir.

Q. These doctors that you were seeing, what was Dr. Glenn's specialty?

A. He was a heart specialist, sir.

Q. And Dr. Stevenson?

A. General practitioner.

Q. And Dr. Verbrycke.

A. He is a specialist in matters of stomach and so forth.

Q. And did you have occasion to go to other specialists in other fields and if so, whom?

A. Yes, sir. I went to Dr. Shapiro. Before I went to Dr. Shapiro, I had a Dr. Coolman who took an interest in my case and advised me and——

Q. Have you had occasion within the last couple of weeks to see any doctors?

A. Yes, sir. I had occasion to see Mr. Guynn and then I went to see Dr. Holtzman.

Q. As you have noticed, has your condition improved since this occurrence in March?

A. No, sir.

Q. Could it be possible for you to describe to the Court and jury how you have been feeling; what you felt has been wrong with you?

A. Well, I feel that some of my organs have been
18 damaged by this blow which I received.

Mr. Brick: If Your Honor please, I still do not think this witness is qualified to say that, "I feel that some of my or-

gans have been damaged by this blow". He can tell the Court and jury what pain he has suffered.

Mr. Miller: That is what I want to bring out.

The Court: The witness will limit his evidence to statements and not conclusions.

The Witness: There are days I feel fairly well and days I feel dizzy and confused. I have pains.

By Mr. Miller:

Q. Have you ever, since this happened, felt able to go back to work?

A. No, sir. I felt on the few days when I was feeling pretty fair that I was going to get better and proceed to——

By Mr. Brick:

Q. Mr. Ersler, what type of work have you been doing since March 22, 1948?

A. I haven't been doing any work.

Q. As a matter of fact, you recall when we took your deposition, do you not?

A. Yes.

19 Q. You recall when we took your deposition?

A. Yes.

Q. It was in the office of your then lawyer, Mr. Harris?

A. Yes, sir.

Q. You recall then that you testified, under oath, that you were what was known as a stock market trader?

A. I testified that I did trading in the stock market because you and I both have been in the same place. That is an avocation. That is not a vocation.

Q. As a matter of fact, how frequently do you go into the stock market companies around town, like Hibbs?

A. I go there every day. It is like a club house to me.

Q. How long have you been doing that?

A. I would say since about March, 1948; maybe a little before.

Q. What other companies do you deal with besides Hibbs?

A. I don't deal with any besides Hibbs.

Q. Can you name some other stockbrokerage houses that you go into?

A. Yes, sir.

Q. Give us the names of those.

A. I go into Hemphill Noyes, Bache & Company and possibly some others. I have acquaintances in all of these places.

20 Q. Do you buy stocks?

A. Not as a means of livelihood and not one or two; maybe just to change what little investments I now have and mostly sell what I had to get money to live on. I need money.

Q. What companies in town have you carried accounts with since 1941?

Mr. Miller: Object, if Your Honor please. This goes back way before this thing happened. I think it should be limited to 1948 on.

Mr. Brick: If Your Honor please, it is my purpose to show he has carried this on as a continuous sort of business since coming to Washington or at least since 1945 when he left the War Department.

The Court: For that purpose, the Court will permit the answer.

By Mr. Brick:

Q. Will you name the companies that you have bought stocks from in the District of Columbia or carried accounts with?

A. Bache & Company, Hibbs and Merrill Lynch.

Q. Bache & Company, Hibbs and Merrill Lynch?

A. Yes, sir.

Q. Will you give us the name of the person at the War Department who can give us the information that the
21 only reason you did not get this job in 1948 that you were supposed to go down and get was because you didn't show up the next day?

Mr. Miller: Object to that question, if Your Honor please. It has not been shown there is any person in the War Department who said that.

The Court: He may answer the question.

The Witness: I am a little confused about that question.

By Mr. Brick:

Q. Give us the name of anyone at the War Department who could give the Court and jury the information that the only reason you didn't get this job that you were after in March of 1948 was because of the fact you did not show up on March 22, 1948, to keep the appointment that you claim you had?

A. I don't believe I could answer that question.

Q. Will you give us the name of someone who could give us the information about that?

A. Well, I don't believe I can answer that question.

Mr. Brick: I submit, if Your Honor please, he should give us the name of the person who can give us that information. He has come here and testified he did not get that job because he was not able to keep that appointment the next morning and I submit we should have the right to know who it is so we can subpoena them in here and see what the situation was.

22

The Court: You may ask the question.

By Mr. Brick:

Q. Answer the question.

A. Well, I didn't go there. I couldn't answer the question. I wasn't there.

Q. As a matter of fact, you don't know why you didn't get that job that day, isn't that so?

A. I don't quite understand that. I am a little confused about what you are talking about.

Mr. Brick: Will you read that question again, please? I want him to answer that question.

(The question was read by the reporter.)

The Witness: Well, I didn't go there to get it.

By Mr. Brick:

Q. As I understand your testimony, you testified that the only reason you didn't get this job was because you were

not able to keep your appointment on March 22, 1948. Wasn't that your testimony?

A. I didn't use the word "only". I said the reason I didn't get it was that I didn't go there.

Q. Will you give us the name of any gentleman or gentlemen over at the War Department who can tell us whether it was because you didn't keep that appointment that you didn't get that job?

23 A. A matter of hearsay. The judge instructed me not to——

Q. I want you to give us the name, not the conversation, give us the name of the person who can come down here and give that information to this Court and jury.

A. I believe Colonel Heiss' secretary would if we knew who it was. I don't know the lady's name. I believe Colonel Heiss would too.

Q. Colonel Heiss would give us that information?

A. I believe he would. He didn't see me. He don't know anything about it.

Q. Did you know Colonel Heiss previous to this time?

A. Yes, sir.

Q. And you have worked under him previous to this time?

A. He was chief—he was the assistant to the Chief of the Field Service Division and I worked in the Field Service Division.

Q. And you are certain he would give us the testimony that if you had shown up on March 22, 1948, you would have gotten the job that you thought you could get?

A. The chances were very good, sir.

Q. But they were only chances, is that correct?

A. Well, more than chances because I believe a friend of mine—I can't say that either.

Q. Since March 22, 1948, have you sold any radios
24 to anybody?

A. I may have but I don't remember.

Q. As a matter of fact, you also were selling radios at the same time you were a stock market trader, is that correct?

A. No, sir.

Q. Will you tell us what type of stocks you have dealt in since March 22, 1948? Name some of the companies that you bought stock in.

A. I have given Mr. Miller that list. I can't offhand.

Mr. Miller: Here is the list.

The Witness: I disposed of Central Rail of New Jersey stock; disposed of Interlake Iron; disposed of Market Street Railway, prior preferred stock.

Mr. Brault: What was the last one?

Mr. Brick: Market Street Railway, prior preferred stock. That is in San Francisco.

The Witness: Natomas Company; Lima Hamilton Corporation; Richfield Oil Corporation; Patino Consolidated Mines; the Third Avenue Transit; American Power & Light.

By Mr. Brick:

Q. Interlaken——

A. No. I. T.

25 Q. I. T., that is International Telephone and Telegraph?

A. International Telephone and Telegraph.

Q. It is a radio and television company?

A. A holding company.

Q. As a matter of fact, wasn't your special field in radio?

A. I was an industrial engineer and I was very well acquainted with the radio field.

Q. You know, as a matter of fact, that International Telephone and Telegraph is a radio or television stock, is it not?

A. There is a difference of opinion there, Mr. Brick.

Q. Give us a list of the other stocks that you dealt in.

A. Yes, sir. These are the ones I sold, answering your question; Pan-American——

Q. Give us a list of stocks that you now own.

A. That is the difference between the two with the following exception; Avco preferred.

Q. Which is a radio and television stock mainly, is it not?

A. Not when I bought it, sir.

Q. But it is today, is it not, and is so rated on the stock market?

A. We don't have to discuss that, I don't believe.

26 Q. I am asking for a yes or no answer on that.

A. The answer is no, when I bought it.

Q. What is it today? What is it considered as, a radio and television stock?

Mr. Miller: If Your Honor please, I don't see the necessity of going into all this about stocks.

The Court: What is the purpose of the inquiry?

Mr. Brick: I want to show the Court and jury this man has been carrying on an occupation as a stock trader. He knows about the stock market by the list of stocks he has read off. He has shown he has had dealings in stocks.

The Court: Is it necessary to go into the details?

Mr. Brick: I won't go into the details of each and every stock. I will withdraw that.

By Mr. Brick:

Q. Tell us the rest of the stocks that you own.

A. At the present time, sir, the Avco preferred; Cessna Aircraft Company; The Lehigh Valley Coal; South American Gold & Platinum; Schulte Stores.

Q. Schulte Cigar Stores?

A. General Plywood; Eversharp; U. S. Industrial Chemical and Yates American Machine Comapny. These are all my accounts at Hibbs.

Q. Do you own any other stocks?

A. Yes, sir.

27 Q. Give the names of the companies that you own stocks in besides those at Hibbs.

A. Well, Tim Aircraft Corporation; McGuire Industries; Central Lever Brewing Company; Carson Hill Gold Mining Company; Stokeley Foods. There may be more or less, I don't know. I would have to consult my records. They are in the box in Chicago.

Q. Do you have any records in the District of Columbia that would give us a complete list of stocks that you now own in different companies?

A. I am afraid not, sir.

Q. Do you have any accounts with Hemphill Noyes or any other stock broker company in town?

A. No, Mr. Brick.

Q. So the only account you have outstanding at the present time is the one you have at Hibbs, is that correct?

A. Yes, sir, to the best of my knowledge.

Q. Do you own any interest in other stocks in conjunction with other people?

A. Yes, sir.

Q. Will you name some of the people who own stocks with you and also what stocks they are?

A. My wife.

Q. Who else?

A. I don't have no partners or anything like that,
28 Mr. Brick; if that is the intent of your question.

Q. What stocks do you and your wife own other than those you have mentioned?

A. I believe that is the full list, sir.

Q. Do you engage actively in buying and selling stocks besides those that you have mentioned?

A. No, sir.

Q. Are you giving information to other people at the market for which you receive a stipend as to what stocks they should buy and sell?

A. I wish I could, sir.

Q. I am asking you, do you?

A. The answer is no.

28 Q. On this particular night, will you tell us what time it was that Mr. Liner came into the hotel?

A. The night of the assault, sir?

Q. That is right.

Q. And at that time, where were you?

29 A. In front of the desk.

Q. How were you standing at the desk?

A. In front of it, directly in front of it.

Q. The desk at the Cairo Hotel, as I recall, is over against the wall like this (indicating), is it not, and the elevator is over here (indicating)? You lived there a long time, isn't that a fact?

A. Yes. This was the front of the desk, the corner the juror is in, and the far corner would be where the elevator is or where the window is.

Q. Just about that distance?

A. No, it would be longer than that, bigger than that, but it would be, I would judge, about 20 feet, 25 feet.

Q. If you were facing the desk, did you see anybody come off the elevator?

A. If you turn around, you will.

Q. So that when the elevator came down, you turned around, is that the testimony?

A. No, that is not my testimony. The elevator came down. I heard the sound of it coming down and I heard voices, people talking in loud tones, or something like that, whatever you want to describe it, and I turned around and I noticed Mr. Liner and his friends came down.

Q. But you are positive it was Mr. Liner who came out of the elevator? You are positive about that?

30 What is your answer?

A. Well, he could not have come through the floor and he could not have come through anywhere else but the elevator. It is a deduction, sir. It is a deduction, a logical deduction, sir.

Q. You don't know whether he came through the front door of that hotel, did he?

A. No, he did not.

Q. You are positive of that?

A. My hearing was better then that it is now and I remember that the door did not turn.

Q. All right. When he came into the hotel, as you say, on the first floor where you were standing in front of the desk, where did he go?

A. I don't know. He appeared in front of me.

Q. Was he alongside of you or was he behind the desk?

A. Behind the desk in front of me.

Q. All right. How long did he stand there talking to Mr. Meder?

A. At the corner of the letter rack—you are familiar with the Cairo Hotel lobby—he got behind there and whispered to him for about, a very short space of time. I don't know how long.

Q. At that time, you had an adding machine list in your hand?

31 A. No, sir.

Q. What did you have in your hand?

A. Nothing.

Q. What had you done with the adding machine list?

A. Put it down right in front—

Q. At the time Mr. Meder went to talk to Mr. Liner?

A. Put it down in front of me.

Q. Then what did you do while you were standing there?

A. Puffed my pipe.

32 Q. All right. When was the first time that Mr. Liner spoke to you after he got through speaking to Mr. Meder?

A. When he called me, he said what I told you previously.

Q. Tell us again what happened.

A. Well, he went away then. There was quite a space of time—

Q. Where did he go?

A. Well, he appeared at the corner that you were referring to, right through the corner there, standing there. It was an open desk, L-shaped, and he was at the corner of the desk there and Mr. Meder just bent over his desk. There was some words passed there and some time had passed so I picked up the adding machine list again and looked at Mr. Meder for I assumed he was ready to proceed.

Q. How much time passed?

A. It could be five minutes, ten minutes, maybe fifteen minutes.

Q. Could it have been as much as twenty minutes, as you testified before?

A. It could be twenty minutes, sir.

Q. And all that time you stood right at the counter waiting?

A. Yes.

33 Q. And then you picked up the adding machine slip again?

A. Yes.

Q. Then what happened after that when you picked it up?

A. Mr. Liner said, "Put that down."

Q. Did you put it down?

A. I did.

Q. Then what happened?

A. I said, "Aw, Red".

Q. What happened after that? What did you say to him and what did he say to you?

A. He didn't say nothing to me. He just hit me.

Q. How did he hit you?

A. He hit me on the right side of the face.

Q. Tell us exactly how he hit you. Tell the jury just exactly what he did to you.

A. I can't remember the exact details, whether he turned his little finger up or anything but he hit me there and the pipe flew in the corner. It has been two years now——

Q. Do you recall that we took your deposition in the Transportation Building, Suite 801, on December 17, 1948?

34 A. Yes, sir.

Q. And on page 11, in answer to a question by myself, you stated this:

"I stepped away about a foot or two and I said 'All right,' and I went back and leaned on the counter. Then he suddenly reached over—I thought he was going away from that spot—he suddenly reached over and grabbed the pipe which I had clenched in my right side very fast. I was very astonished. I mean it was just like lightning hit me, and he wrenched it out of my mouth and threw it behind the counter. I guess my jaw dropped. I was so surprised. It was so fast and whatnot. It caused a little pain. I was very astonished at the moment. It was just like a blow."

A. May I see that to refresh my memory?

Q. I am asking you to read right there, the part that is underscored. Isn't that your testimony, right there on page 11?

A. May I turn the page one way or another?

Q. No, I am asking about——

A. I wasn't feeling well that day and I believe there is something in the testimony there that you have——

Mr. Brick: If Your Honor please, he is not answering the question. I ask that that be stricken and that
35 he answer the question.

The Court: Answer the question if you answered as counsel has inquired.

The Witness: I must have. It is there.

By Mr. Brick:

Q. Tell us, after this pipe was wrenched out of your mouth, exactly how many blows and show the jury just what blows Mr. Liner is allegedly supposed to have struck you with?

A. Well, I believe——

Q. I want your recollection as to exactly what happened, not what you believe. Tell us exactly what happened.

A. I don't have a recollection. I know he hit me.

Q. How many times did he hit you?

A. I think it was several times is my recollection.

Q. You are not sure whether he hit you at all, are you?

A. Yes, I am sure.

Q. About the only thing you are sure of is that he grabbed your shirt and tie, isn't that so?

A. No, that is not so, because he had his other hand there working too.

Q. What was he doing with his other hand? Tell the Court and jury what he was doing.

A. He hit me with his other hand.

Q. How?

36 A. In this area (indicating).

Q. How many times did he hit you, twenty times, fifty times, forty times?

A. No; it would be several times.

Q. Did he cut any portion of your skin or your body by hitting you the way you say he hit you?

A. I believe there was a bruise there or something like that.

Q. Where was the bruise?

A. Right here (indicating).

Q. Did the doctor see it when you went to him?

A. I don't recall.

Q. As a matter of fact——

A. Hearsay.

Q. As a matter of fact, who sent you to Dr. Stevenson in the first place, who told you to get a doctor?

A. I don't believe anybody directed me to get a doctor.

Q. As a matter of fact, when was the first time you went to see your lawyer, Mr. Harris, your then lawyer?

A. I don't recall if it was before I went to a doctor.

Q. As a matter of fact, didn't he tell you to go see a doctor?

A. He asked me if I did see a doctor and I said "No". He said, "You should have".

Q. And, as a matter of fact, it was 18 days after
37 this accident that you first went to see a doctor, isn't that so?

A. That is so. I went there because I felt I needed a doctor. I didn't go there before——

Q. Didn't you just testify that your lawyer told you to go see a doctor before you went to see a doctor?

A. He suggested it but I didn't want to go. It had nothing to be—I felt it would pass away. I thought a week or two would enable this thing to pass away. It was just a scuffle. He met me on the street——

Q. Mr. Ersler, I would just like to ask you one or two further questions. Is it or is it not a fact that, on some occasion prior to this you had a fight or altercation with another guest in the hotel?

The Witness: I don't recall.

38 Q. At the time that you claim Mr. Liner had you around the tie and shirt, isn't it a fact that you were holding his other hand?

A. I was holding his hand after I was hit to prevent more blows. I grasped his wrist.

39 Cross-examination.

By Mr. Brault:

Q. Mr. Ersler, how old are you now, sir?

A. Going on 47, sir.

Q. And at the time of this incident, were you married or single?

A. Single.

Q. Are you married now?

A. Yes, sir.

Q. When were you married?

A. March, 1949, sir.

Q. How old is your wife?

Mr. Miller: I object, Your Honor. I don't see where the age of his wife has anything to do with this law suit.

The Court: I don't see that that is pertinent.

Mr. Brault: I will withdraw it, if Your Honor please.

By Mr. Brault:

Q. You were married in March, 1949?

A. Yes, sir.

Q. And you and your wife now live at the Cairo Hotel?

A. Yes, sir.

Q. And have since the date of your marriage?

A. I remained there, yes, sir.

40 Q. You have lived there continuously?

A. Yes, sir.

Q. Did I understand you to testify that Mr. Liner came off the elevator when you saw him before this occurred?

A. Well, the elevator came down and Mr. Liner was in front of it. I am assuming there.

Q. You don't know whether he came into the building from the outside or not, do you?

A. The sound. The door did not turn.

Q. You didn't hear the door turn?

A. No, sir, but I heard the elevator come down and words like "Don't shove me" and things like that.

Q. That is the reason you assumed he came off the elevator?

A. It is the only assumption I could make, sir.

Q. It is all an assumption on your part?

A. I was later advised—no, excuse me.

Q. You left the hotel that night, Mr. Ersler, at what time?

A. I would judge about around midnight.

Q. And you returned to the hotel at what time?

A. I believe around 2 o'clock, 2:15, maybe 2:30. I don't exactly remember the exact time.

Q. You left at midnight and you came back around 2 or 2:30?

41 A. Yes, sir.

Q. You were having difficulty sleeping that night, were you?

A. Well, there was a Club Cairo at that time downstairs and the fanfare or whatever it is woke me up. I felt sleepy and went to bed but I woke up.

Q. What floor do you live on?

A. The fifth floor.

Q. And you say the noise wakened you?

A. Yes, sir. The window was open. I keep my window open when I sleep, sir.

Q. You are sure you left your room at 12 and not at 2?

A. I left around 12:30 because I dressed and went out. Maybe it was 1 but it was sometime in there. I heard the fanfare or the furor and I dressed and went out.

Q. Did you go out immediately?

A. Yes, sir, I did. There was quite a number of people in the lobby and, as I passed through, I don't recall seeing anybody but I left the elevator and went out the front door.

Q. This was on Sunday night?

A. Monday morning, sir.

Q. Well, Sunday night?

A. Yes, sir.

Q. The club closed at 12 o'clock on Sunday night, did it not?

42 A. That is why I assumed it was 12 or 12:30.

Q. That is the reason that you place the time at 12 or 12:30 when you got up and left the hotel?

A. I was awakened at about 12 o'clock because you have the same information that I have because they closed at 12 or thereabouts.

Q. Do you recall when you testified in this deposition that has been previously referred to and you were asked this question:

"Q. Had you been in and out of the hotel that evening?"

Do you recall that your answer was:

"I left the hotel around 2 o'clock."

A. That is an impossibility. It was 12 o'clock. It wasn't 2. I didn't testify I left at 2. It can't be, with the goings and comings.

Q. You say you didn't testify to that? Would you like to see this?

A. Yes. Where is that?

Q. Right here (indicating).

A. That is a figure. That may be a typographical error. I did not check that. It was 12 o'clock.

Q. There is the figure "2" there, so it could be 12?

A. It could be dropped off.

43 Q. Do you recall that following that answer you were asked this question:

"Who was on duty after this when you left at 2 o'clock?"

And your answer was:

"I wouldn't be able to answer that."

A. That is still my answer. I didn't look to see who was at the desk.

Q. But you still don't recall whether it was 12 or 2 that you left the hotel?

A. My original answer holds. It was around 12:30, something like that, 12; maybe it was 12.

Q. As a matter of fact, Mr. Ersler, haven't you changed the hour of your leaving the hotel since learning that the club was closing at 12 o'clock on Sunday night?

A. No, sir; that was known to me before then.

Q. You knew it then?

A. I still know it.

Q. You knew it when we took your deposition?

A. Yes, sir; but I didn't check the typing of that. It has nothing to do with me, sir.

Q. You say you knew the time the club closed when we took your deposition?

A. Yes; it was around 12. The "1" is missing.

Q. Do you recall we asked you this question at the time the deposition was taken:

44 "Is the Cairo night club open on Sunday night?"

And your answer was:

"I don't recall but there were a lot of people there."

And then the question:

"You say the people were all coming out of the club?"

And your answer:

"I don't recall. I said there was a lot of people there."

And this question:

"At 2 o'clock in the morning?"

And your answer:

"After the club closes, the lobby fills up with the hangers-on and the people that work there and others and they hang around. Sometimes during that season when it was operated by Mr. Sam Shanker, you could find them around there until 3 o'clock in the morning."

Wasn't it your impression that the club was closing at 2?

A. No, sir. During the week it closes at 2 but, on Sunday, it closes around midnight.

Q. You have learned that since we took your deposition?

A. No, sir, I knew it then.

45 Q. You still testified then you left at 2 o'clock, didn't you?

A. I didn't testify I left at 2 o'clock, sir. I said 12 o'clock; whatever time that is required for dressing. I didn't check out. I am not running a time clock procedure.

Q. How long did you work under Colonel Heiss?

A. I worked under Colonel Heiss in 1943 and he went overseas and got up in rank, in position or stature with the Army organization.

Q. Do you know what his rank is now?

A. No, sir. I am not a familiar of his, sir. He was a war——

Q. Were you personally acquainted with Colonel Heiss?

A. No, sir. He knew me, said "Hello" as we passed when I was working under him and—hearsay.

Q. You say he knew you?

A. Yes.

Q. You had a speaking acquaintance, did you?

A. I don't know how you say it. He knew his employees. I was an employee.

Q. In other words, if Colonel Heiss was brought in here now, is it your impression or your understanding that he should know you? Did you know him that well?

A. No, sir.

Q. You didn't know him that well?

A. I don't know whether he would remember or
46 not. A man may be a man of excellent memory—a lot of these Army men are—and if Colonel Heiss came in and stood right in front of me, I probably wouldn't recognize him but he might recognize me. My mind isn't, I mean——

Q. Your memory isn't too good?

A. My memory is very good, sir, but it takes me some time to adjust these recollections. It takes me time to remember.

Q. But you do have a good memory?

A. I don't say I have a good memory or a poor memory. I have a memory.

Q. I would like to ask you this, Mr. Ersler: Who did you consult first in connection with this case, your doctor or your lawyer?

A. I first went to the dentist.

Q. After you went to the dentist, who did you consult?

A. The first thing I did was I spoke to Mr. Stillson who was the manager at the hotel about what had occurred.

Q. My question was: Did you consult a physician first or a lawyer first about this case?

A. I first consulted a dentist is the answer.

Q. I understand that. After you saw the dentist, did you first consult a physician or a lawyer?

A. Then I consulted a lawyer.

Q. And it was the lawyer who sent you to the
47 doctor, is that right?

A. No, sir.

Q. It was not?

A. No, sir, absolutely not.

Q. Mr. Ersler, I would like to read you this question answer which was asked of you at the time your deposition was taken.

A. All right.

Q. (Reading:)

“Q. When did you first consult a physician?

“A. I don’t remember. Mr. Harris advised me when I saw him. I said I was just bruised up a bit and don’t feel well, but he said I may have injuries, and I went to a physician when I couldn’t walk.”

A. Right.

Q. The Mr. Harris referred to in this answer is the attorney that you consulted, is that right?

A. That is right. I objected to going to a doctor when it wasn’t called for. I thought maybe this was a scuffle or something and I objected to going to a doctor because I didn’t feel it was necessary at the time. I mean I assumed it wasn’t. Apparently, I didn’t know there was anything wrong or anything. It just hurt and I figured it would go away.

Mr. Brick: If Your Honor please, may I ask Mr.
48 Ersler another question that I overlooked when I had him on cross-examination?

The Court: You may ask.

Mr. Brick: Mr. Ersler, have you ever attended law school?

The Witness: I enrolled at George Washington University in the law school in September and dropped out in October or November due to information I could not carry any work through but I attended maybe eight lectures, that is all, and not in law. It was the history course and a course in contracts. That is all, sir.

Mr. Brick: That contract course was a law course, was it not?

The Witness: It was a law course but I don't have no information as to law.

Mr. Brick: What year was this?

The Witness: 1941.

Mr. Brick: I have no further questions.

Redirect examination.

By Mr. Miller:

Q. Mr. Ersler, you just stated a moment ago, as I recall, that you went to a physician when you got so you could not walk. Have you had any difficulty in walking or using your lower extremities?

A. Yes, I had difficulty.

49 Q. When did you first have such difficulty?

A. Well, it was first my arm. That is when I first went to the doctor and I can't recall exactly but I would imagine a month later.

Q. Later than what?

A. After this assault. I am trying to gauge things as a starting point.

Q. How did this inability to walk or what occurred regarding it? I mean just what happened when you were walking?

A. Well, the legs hurt all the way down, pains, strong pains—there were pains, hurts.

Q. When was it that you enrolled in school in September? What year was that?

A. Well, it was the beginning of the term in the fall in 1941 prior to Pearl Harbor which broke on December 7, 1941.

Q. Did there come a time when there was a change in the managership, that is, of the Schneider Corporation, the defendant here, which no longer actively ran the Cairo Hotel?

A. Yes.

50 The Witness: I would say within two months later, maybe one way or the other; I am not sure.

By Mr. Miller:

Q. At the time you were seized by Mr. Liner, were you wearing a watch?

A. Yes, sir.

Q. Is this that watch?

A. Yes, sir, that is the watch.

Q. And has it run since that time?

A. No—it looks like it, sir.

51 Mr. Brick: I think before you ask a question like that, how about us looking at it?

Mr. Miller: Very well. I am going to offer this in evidence.

(A watch was marked Plaintiff's Exhibit No. 1 and received in evidence.)

By Mr. Miller:

Q. Was that watch damaged as the result of that altercation?

A. Yes; it was damaged then. I picked it off the floor.

52 CHARLES W. ASHE was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name and address?

A. Charles W. Ashe, 1321 K Street, Northwest.

Q. And your business?

A. Newspaper distributor.

Q. Did you at one time live at the Cairo Hotel?

53 A. Yes, sir.

Q. Do you know Mr. Ersler and Mr. Liner?

A. Yes, sir.

Q. And were you a guest at the hotel? Did you rent a room there?

A. Yes, sir.

Q. About when was that?

A. Well, from 1947 was the last time, sometime in August of 1949.

.

60 Q. About how frequently would you have occasion to see or be with Mr. Ersler after hours in the evening, along during this period of time, since March, 1948? Did you have occasion to be with him?

A. Yes; most every evening, as a hotel guest in the lobby and naturally we would congregate in the lobby and talk.

Q. Was that prior to March 22, 1948?

A. I have known him for about ten years, sir.

Q. Will you state to the Court and jury whether or not you noticed any change in the appearance, demeanor, actions of Mr. Ersler after March 22, 1948?

61 Q. Will you state whether or not you noticed any change in the demeanor, appearance, mannerisms of Mr. Ersler after March 22, 1948?

The Witness: Yes, there has been a definite change.

Q. . . . what have you noticed in that regard?

Mr. Brick: I think it ought to be narrowed down because he can go all over and talk about everything generally.

What Mr. Miller has in mind I don't know.

62 The Court: I think the question is, if it is an attempt to establish any pathological condition or any alteration in the plaintiff's state of health, it is an attempt to make an expert witness out of a layman.

The Court feels it is not the proper way of establishing any claim of change in physical condition or even mental condition or nervous condition or any physiological or nervous condition. I believe you are getting into the field of testimony that requires more expert information than this witness presents.

By Mr. Miller:

Q. Did you have occasion to have conversations with Mr. Ersler after March 22, 1948?

The Witness: Yes.

.

64 By Mr. Miller:

Q. Approximately how frequently would you see him, Mr. Ashe, after March, 1948?

A. At least once a day.

Q. For about how long would you be in his presence?

A. Well, my work would call for me coming in late at night—oh, two or three hours at least.

[Q. Based upon your observation of Mr. Ersler, as you testified to here today, were you able to form an opinion as to whether or not he was able or unable to work since that time?]

Mr. Brick: If Your Honor please, I object to that. He is not competent to form an opinion as to whether or not the man was able to work or not because his testimony, as I understand it, is that he sees him two or three hours every day at night. How would he be in a position to be able to give an opinion as to whether or not Mr. Ersler was able to work?

If they could show that he had worked with him on a job and the man just could not do the job, that is a different proposition but for him to have a recollection like that—

Mr. Miller: I rely on *Woltman v. United States*, a case that I have here.

Mr. Brick: May we approach the bench, if Your Honor please?

65 The Court: You may.

(Thereupon, counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Miller: Your Honor, here is a case I had in our Court of Appeals in 1932, the second to the last paragraph. That was a case in which the Court of Appeals held that a non—

The Court: What is your point? This is a medical witness.

Mr. Miller: No, it is the next paragraph, if Your Honor please, about a lay witness.

Mr. Brick: What type of case was it, Mr. Miller?

Mr. Miller: That was a suit where the question involved the ability of the individual to work.

Mr. Brick: That is not the question here.

Mr. Miller: It is one of the issues here.

Mr. Brick: What did it arise out of? Was he a Government employee?

Mr. Miller: It was disability——

Mr. Brick: Compensation?

Mr. Miller: The question involved was his ability to work, compensation.

Mr. Brick: Under War Risk Insurance?

Mr. Miller: Yes.

66 Mr. Brick: That is a different proposition.

Mr. Miller: The weight is for the jury.

The Court: Of course, I have not read the facts in this case and the observation of the Court is based on that fact but it does not appear to the Court to be a case in which this type of testimony would be justified under the rule announced. After stating that the evidence showed that the witnesses were in a particularly favorable position to observe the insured as an ordinary intelligent observer, but not to require a professional diagnosis, it states it is always proper to permit a non-professional witness, who has had an opportunity to observe a sick or injured person to state whether he is able or unable to work. Of course, applying just ordinary common sense to this case, there is no contention that this man was helpless.

Mr. Miller: Unable to work.

The Court: Unable to work because it would depend a good deal upon a great many circumstances or what type of work and your question to this witness as to whether this man was able to work, seems to me, would not be based upon such foundation.

Mr. Miller: If Your Honor please, he said he had seen him every day or in the evening for an hour or so and our offer of proof on the question of the other questions that

Your Honor has ruled out is that he would testify, if
67 permitted to testify as to certain facts, that he personally observed as a layman, that he was in the presence of the plaintiff and he knew the plaintiff was different than he was before this accident and that these

things, his method of speech, his method of carrying on conversation and so forth indicated that he was just not capable of working.

Mr. Brault: Even Judge McLaughlin could not tell whether this man was able to work or not from his testimony here today and there is just no sufficient foundation laid for any such testimony. I do not think that case applies at all.

Mr. Brick: It does not apply one bit.

The Court: I do not believe the circumstances of this case make this citation applicable.

68 ELOISE SPENGLER was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your full name, please?

A. Eloise Spengler.

Q. What is your profession, Miss Spengler?

A. I am a nurse.

Q. For whom do you work?

A. Dr. Glenn.

Q. What type of practice does Dr. Glenn have?

A. He is a cardiologist.

Mr. Brick: I think the man who is most qualified to testify to the type of practice he has is Dr. Glenn himself.

The Court: She may answer.

By Mr. Miller:

Q. How long have you been with Dr. Glenn?

A. About eight years.

Q. What does your work consist of with Dr. Glenn?

69 Do you operate the electrocardiograph machine?

A. I do most of the technical work and keep the records and just assist him in general matters.

Q. Have you custody of the records of the office?

A. Yes.

Q. And have you brought with you the records of your office pertaining to Mr. Edward Ersler?

A. Yes.

Q. Did you take the electrocardiogram of him?

A. Yes, I did.

Q. Will you produce that, please?

A. Yes.

Mr. Miller: We offer this in evidence.

Mr. Brault: Your Honor, we have no objection as to the genuineness of this electrocardiogram but we reserve any other objection we may have to it later on.

Mr. Miller: Will you mark that as Plaintiff's Exhibit No. 2 for Identification?

(The electrocardiogram was marked Plaintiff's Exhibit No. 2 for Identification.)

By Mr. Miller:

Q. Did you take an X-ray of his chest?

A. Yes, we did.

Q. Do you have that with you?

A. Yes.

70 Q. Is this the X-ray?

A. Yes.

Mr. Miller: We would like to introduce this as the next exhibit, Plaintiff's Exhibit No. 3.

Mr. Brault: We have no objection.

(The X-ray was marked Plaintiff's Exhibit No. 3 and received in evidence.)

Q. Is that Dr. Glenn's report?

A. It is a copy of Dr. Glenn's report to Dr. Stevenson.

71 Mr. Miller: The report of the doctor, Dr. Glenn, yes.

The Court: To whom?

Mr. Miller: To Dr. Stevenson dated April 21, 1948.

The Court: The objection is sustained.

Mr. Miller: Would you ask Dr. Glenn to come down right away?

The Witness: Yes, if I can locate him.

The Court: That will be identified as an exhibit.

Mr. Miller: I ask that that be marked for identification.

(The report of Dr. Glenn was marked Plaintiff's Exhibit No. 4 for Identification.)

LELAND E. STEVENSON was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name, residence and occupation?

72 A. I am Dr. Leland E. Stevenson and I do general medicine. My offices are at 1219 16th Street, Northwest. I have been practicing in the District of Columbia since 1934.

Q. And your practice is of a general nature?

A. That is right.

Q. In the course of your practice, have you had occasion to examine and treat Edward S. Ersler who sits behind me here?

A. Yes, I have.

Q. Will you tell the members of the jury and the Court when Mr. Ersler first saw you and over about what period your observation of him extended?

A. Mr. Ersler first came to see me, consult me on April 9, 1948. The time of his last consultation, his last visit, was June 23, 1948, and, during this time, he was periodically in the office. I saw him altogether 18 times.

Q. Would you just give us a report of your examination and findings?

A. At the time of Mr. Ersler's first visit, he stated that he had been in an altercation of some kind and sustained

a sprain of his right hand, particularly involving—wait a minute, I want to make sure about the hand—the right hand and that it had been bothering him for 18 days and that he felt probably it was best to seek some medical help for this condition.

73 Examination at this time revealed a slight swelling at the base of the thumb and a mild swelling of the hand and his symptoms, the thing that bothered him the most was the pain radiating up his arm.

Later on, he also complained of pain down through his back, his hips, his thighs, and he was treated with the usual methods, physiotherapy, short-wave, counter-irritants and, at the time of his discharge, I felt that these symptoms had pretty well cleared up. At least, there were no objective symptoms at the time of his last visit.

Q. Was the function of his right hand normal when he came to see you first?

A. The function was moderately limited, I mean for grasping movements, flexion.

Q. How did you account for his symptoms, Doctor?

A. Well, apparently it was a strain, sprain, stretching of some of the ligaments that go to make up the hand.

Q. Did you write a report on this on June 16, 1948, and do you have a copy of that?

A. Yes, I have a copy of the report.

Q. Referring to that report, if you need to refresh your recollection, what was your opinion as to the condition which you found other than the physical findings?

A. Well, Mr. Ersler complained and apparently there was no doubt about him being rather nervous, weak and emotionally upset, emotionally disturbed, apprehensive.

74 Q. Was there or not evidence of his system having been shocked?

Mr. Brick: If Your Honor please, that is a leading question of the worst kind.

The Court: Avoid leading questions. Let the witness testify of his own volition as the result of questions propounded rather than leading questions.

By Mr. Miller:

Q. What else did you notice about him, Doctor?

A. At the time of his discharge and during the course of his treatment, the thing that impressed me the most was his emotional stress and strain, nervousness, his inability to relax, concentrate, and it is a rather difficult thing to evaluate but he seemed to be depressed.

Q. Was this condition, in your opinion, of a casual connection with this incident that he related to you?

Mr. Brick: I object to that. Again, he is leading the doctor. The doctor is well qualified to state what he found.

Mr. Miller: I think that is proper.

The Court I think he may answer.

The Witness: Well, it is really a difficult thing to evaluate, I mean it is possible that an altercation could create a disturbance, emotional disturbance but it would be difficult to state without qualification that such is the case.

75 Mr. Miller: That is all.

Cross-examination.

By Mr. Brick:

Q. Dr. Stevenson, you have no independent recollection of this treatment except what you have read from your notes, is that correct?

A. I can remember Mr. Ersler's case rather well but, for the details, it is necessary to refer to the record.

Q. In your report, you do not say anything about depression there, do you?

A. In the report that I wrote at the request of Mr. Ersler?

Q. That is right.

A. To his counsel?

Q. There is nothing in there saying that he was depressed, is there?

A. Should I read it to the Court?

Q. No; I am asking you to look at it and tell me if, in that report, you mentioned anything about him being depressed when you wrote this report on June 16, 1948.

A. There is nothing specifically stated in this report.

Q. You didn't find anywhere other than this little swelling that you talked about where he had any evidence of injury to his bony structures or any abnormalities of any
76 of his bones, did you?

A. That is right. The X-rays were negative.

Q. In getting the history from Mr. Ersler, didn't he tell you that he had always been quite nervous?

A. The only history note that I have here—I did not obtain a history of nervousness.

Q. Did you question him about that?

A. I questioned him about his general health and the only history note I have is that he was generally well, active and vigorous.

Q. You didn't question him about any previous nervous upsets or anything?

A. I didn't question him at any length about any previous nervousness.

Q. The type of treatment and medication you gave him was just treatment to solve any complaint that he might have, is that right?

A. That is right and some supportive therapy here in the way of B-complex.

Q. What was that for, specifically?

A. Where you have nervous irritability, it does often help to lay some of the symptoms without resorting to too many sedatives.

Q. What was the amount of your bill for services rendered?

77 A. \$93.

Q. Has that been paid?

A. Not to date.

Mr. Brick: No further questions.

Cross-examination.

By Mr. Brault:

Q. Dr. Stevenson, when Mr. Ersler first came to see you, he did not complain about any injury to his legs?

A. No.

Q. All he complained about was his thumb, his hand?

A. Thumb, hand and radiation of pain up to his shoulder.

Q. When you discharged him in June, 1948, he had substantially recovered from all his symptoms, had he not?

A. The physical symptoms.

Q. He had made a complete recovery?

A. His nervous symptoms, which I said are difficult to evaluate, they were probably more severe.

Q. But you don't know what caused those nervous symptoms, do you?

A. It is difficult to state specifically.

Q. Other than that, he had made a complete recovery?

A. I think so. I think, organically, he was sound at that time.

Mr. Brault: That is all.

Mr. Brick: No further questions.

78 SAUL HOLTZMAN was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Miller:

79 Q. Will you state your name, residence and occupation, Dr. Holtzman?

A. Saul Holtzman, physician, located in the practice of medicine at 900 17th Street, Northwest.

Q. How long have you been a practicing physician in the District of Columbia?

A. Ten years.

Q. Will you state for the record your education, training and experience, particularly any specialized training that you have had?

A. Medical internship in 1937 at the Garfield Memorial Hospital; medical internship in 1938 at Sinai Hospital, Baltimore, Maryland; medical residency, 1939 Garfield Memorial Hospital; post-graduate work in cardiology at

Massachusetts General Hospital in 1940. I am a member of the American Board of Internal Medicine and have been since 1946 and am practicing internal medicine.

Q. Did you have occasion to examine Edward Ersler who sits behind me?

A. Yes, sir.

Q. When was that?

A. Yesterday.

Q. What did you do?

A. I made an electrocardiogram of Mr. Ersler and listened to his heart, examined his heart and checked his blood pressure and pulse.

80 Q. Will you tell us what you found?

A. The blood pressure was 150/105; pulse was 100; heart sounds were in the normal range and no murmurs were heard. The electrocardiogram——

Q. Do you have the electrocardiogram with you?

A. Yes, sir.

Q. Would you produce it, please?

A. Yes.

Mr. Miller: I would like to offer this in evidence, the cardiogram that the doctor took.

Mr. Brick: May we approach the bench, if Your Honor please?

The Court: You may.

(Thereupon, counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Brick: I object to the admission of this for this reason: Mr. Miller was supposed to give us a list of all his medical witnesses. We knew nothing about Dr. Holtzman. We have not had any report from him. We are not in a position to meet this or at least I am not.

Mr. Miller: He only saw him last night.

Mr. Brick: The pre-trial order will show that, if Your Honor, please.

81 Mr. Brault: You don't contend that this heart condition was a result of this accident, do you, the result of this assault? Is that what you are trying to show?

Mr. Miller: Show what the situation is, I mean I am going to ask him to testify——

Mr. Brault: That he has this heart condition?

Mr. Miller: That he has this particular heart condition.

Mr. Brault: How will that have any bearing on this case? I do not see that it will.

Mr. Miller: Yes, it will, from this standpoint: I expect to show from this testimony that, in view of the electrocardiogram that is in evidence that Dr. Glenn took, that that condition still exists and that, in view of the findings of this electrocardiogram, this condition existed some time prior to March 22, 1948, and eliciting an opinion from the witness as to the effect on such a person suffering from this condition, whose heart was in this condition.

The Court: When was the electrocardiogram taken?

Mr. Miller: Within a month after this occurrence.

The Court: It was taken April 21. This altercation was March 22.

Mr. Brick: I will say this about Mr. Miller. Mr. Miller was not at the pre-trial but Mr. Miller had taken over the case when he said he would furnish a list of witnesses and

I object to him bringing in a witness whose report
82 we know nothing about. Otherwise, what good is your pre-trial order?

Mr. Brault: There has never been in this case—Mr. Miller, of course, just came into the case recently—but there has never been in this case any contention at any time that this man had a heart condition or that that had any bearing on the thing at all. He had an aggravation of a heart condition. It was not alleged in the complaint. There was no statement made on it in the pre-trial hearing and I just do not think they can bring these things in at the last minute.

Mr. Miller: If Your Honor please, we furnished them with a copy of Dr. Glenn's report and that report—

Mr. Brault: There is no medical report you furnished me that that had any connection with this incident at all.

Mr. Miller: It shows his condition.

Mr. Brick: You have not alleged it in your complaint.

Mr. Miller: We have a right to bring in an expert.

Mr. Brault: The purpose of the medical report is to inform us in advance and to be able to meet it at the trial, the nature of the injuries and damages claimed. There has

never been any claim in this case that the heart condition, if there is one, had any connection with this suit.

Mr. Miller: I am not contending it was caused by it.

Mr. Brault: I know what you are contending, that it was aggravated.

Mr. Miller: That is right. We are alleging bodily
83 injury and that is part of it.

Mr. Brick: That is not bodily injury.

Mr. Brault: At the pre-trial hearing, they were ordered to furnish us the medical reports and there is no report that alleges anything of that kind.

Mr. Miller: The report of Dr. Glenn, which they have, shows there is a left heart strain. I mean his report is an interpretation of this and it can go in evidence.

Mr. Brault: That is not traumatic.

Mr. Miller: He shows it is a left heart strain.

Mr. Brick: But you did not make any claim to that effect.

Mr. Brault: There is no contention that it had any bearing with this case.

Mr. Brick: If Your Honor please, we are taken by surprise on this and that is the ground of our objection.

Mr. Miller: If Your Honor please, a copy of this report which they have, shows this man is suffering from cardiac damage and it also shows he is suffering from an early left heart strain.

Mr. Brault: That is true, but my point is all the doctors this man has gone to and copies of whose reports have been supplied us, not one of them has said that this heart condition has anything to do with this at all.

Mr. Miller: The condition that he is in is a question
84 for the jury as to what effect it would have based on the evidence. In other words, I can bring in an expert witness. This man only saw him last night. As far as his report is concerned, he saw him and is his E. K. G. the same?

Mr. Brault: This is an entirely new theory of the case. You have never advanced this theory to me, to the Court or to anybody else nor to your doctors.

The Court: I don't want to be technical about this ruling and I like to see full evidence submitted on any question that is in issue in this case. This seems to turn somewhat on the question of what advice or what notice was given to

the defendants with respect to what they might expect to have to meet.

The allegations of the petition allege that the plaintiff suffered severe injuries to his mouth and teeth, had his pipe destroyed, his clothing torn and damaged and suffered great bodily injury, and there is superimposed or inserted by a caret the words "and permanent" to make it read "suffered great and permanent bodily injury."

The Court does not want to be narrow in construing words of the petition. However, taken in conjunction with the context, the Court does not believe that this connotes the heart condition, "permanent bodily injury" which has a definite connotation toward cases. It means injury not of the nature such as a heart condition. Bodily injury
85 does not include, in the court's view from a practical standpoint, injury of such character as would be included in this heart matter. I do not believe that it would be fair to the defendant at this time to be required to meet a situation like this on which they were not informed.

I am going to sustain the objection.

Mr. Miller: Do I understand, Your Honor, that your ruling goes to the reception of this E. K. G.?

Mr. Brault: And the interpretation of it.

The Court: Yes.

(Thereupon, counsel resumed their places at the counsel table and the following proceedings were had in the hearing of the jury:)

By Mr. Miller:

Q. Doctor, I hand you here an electrocardiogram, Plaintiff's Exhibit No. 2, and ask you if you would interpret that to the jury?

Mr. Brault: I object, if Your Honor please, on the same grounds that we did before. Our objection went to the entire theory of this line of questioning. We did not object to introducing that cardiograph but I did reserve all objections except as to its authenticity. I object to the question.

Mr. Miller: The question I am asking him is the question which is a reading of it by a physician, a reading of
86 which was in the report mentioned at the bench.

The Court: What is your objection, to the interpretation of the report?

Mr. Brault: To the interpretation, yes.

Mr. Miller: He is making an original interpretation.

Mr. Brault: We are making the objection on the same basis that we discussed at the bench.

The Court: The Court sustains the objection.

Mr. Miller: May counsel approach the bench a moment?

The Court: You may.

(Thereupon counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Miller: Your Honor, I would like to make, at this time, out of the hearing of the jury, an offer of proof which is the reading of this electrocardiogram that, if this doctor were permitted to testify, the doctor would testify in accordance with his report dated April 21, 1948, from Dr. Glenn, a copy of which was duly furnished opposing counsel sometime before trial, to get into the evidence the reading of the electrocardiogram.

The Court: The Court has stated its position with respect to this. The same ruling.

Mr. Miller: Very well.

87 (Thereupon, counsel resumed their places at the counsel table and the following proceedings were had in the hearing of the jury:)

Mr. Miller: Counsel understands that this objection goes to all lines of questions along this particular line, Your Honor.

The Court: Yes.

Mr. Miller: Under those circumstances, I have no further questions to ask of the witness.

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99 JOSEPH BURTON GLENN was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name, residence and occupation?

A. Joseph Burton Glenn. I am a physician.

Q. State for the record your education, training and experience, just briefly, and your specialty.

A. Heart; cardiology.

Q. You have been a practicing physician for how long, Doctor?

A. Almost thirty years.

Q. Do you get quite a few cases referred from other doctors in the District?

A. That is right.

100 Q. Did there come a time when the case of Edward Ersler was referred to you by a physician here?

A. That is right.

Q. And you made an examination of him at that time?

A. That is right.

Q. Dr. Glenn, your nurse has brought records here from your office. I have this marked as Plaintiff's Exhibit 4, a report with reference to Mr. Ersler. I will ask you if you would just tell the Court and jury what examination you made of him, the date you made it and what you found.

Mr. Brault: Just a moment. May we approach the bench on that?

The Court: You may.

(Thereupon, counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Brault: Your Honor, I understand you have already ruled this testimony out.

Mr. Miller: Not this.

Mr. Brault: Dr. Glenn, as I understand, is going to testify as to his heart condition and our previous objection was based on the fact there has never been any claim of an injury or any aggravation to his heart condition or anything else. No such claim has ever been made.

Mr. Miller: Your Honor, Dr. Glenn is going to
101 testify as to what appears on his report of April 21, 1948, a copy of which was furnished counsel along with the other copies.

Mr. Brault: We understand that, Mr. Miller.

Mr. Miller: Is there any objection to it?

Mr. Brault: I don't object to it.

The Court: Was this report furnished to you?

Mr. Brault: Yes. We had a copy of that. That is not the point that I am making.

The point I make is, Your Honor, although we had a copy of that report that at no time did Dr. Glenn's report or any other medical report or any statement in the complaint or any statement at the pre-trial make any such claim and not until just a few moments ago was there any contention made that that had any bearing on this case.

Mr. Brick: Or any aggravation thereof.

Mr. Miller: He saw him a month after this happened. He was referred to him by another doctor who made an electrocardiograph. The jury is entitled to know what his condition was as reflected by that examination.

Mr. Brault: He changes the theory of his case on damages.

Mr. Miller: I am not changing anything.

Mr. Brault: You never claimed any injury to his heart, that there was any injury to his heart.

Mr. Miller: I expect the doctor to state just exactly
102 what is in that report, Your Honor.

Mr. Brault: Then it is inadmissible unless you are going to tie it in with this particular altercation and I do not think you can do it at this late date.

Mr. Brick: In the pre-trial, it was stated there was injury to his nerves. That is in the second paragraph, one sentence in the second paragraph:

"Permanent injuries claimed to the nerves."

That is the only permanent injury they have claimed in this case.

103 The Court: The Court has ruled on this matter and I believe the Court will adhere to its ruling. There is nothing in the petition and there is nothing in the pre-trial order that would indicate that this type of pathology, except as the Court stated, that the plaintiff "suffered great bodily injury", and the Court believes that the defendants, to be called upon to answer and to defend, are entitled to more advice than that with respect to the allegation of injury, "great bodily injury".

Mr. Brick: All the pre-trial order says is "permanent injury to the nerves".

The Court: The pre-trial order provides:

"Plaintiff agrees to submit to medical examination by a representative of defendant within ten days. Plaintiff's counsel to receive copy of report immediately upon receipt by plaintiff."

However, that would not make this admissible if it did not come within the framework of the position taken, as indicated by the petition, and the Court is of the opinion that it goes beyond the framework of the petition.

Mr. Miller: I would like to make this offer of proof. We offer Plaintiff's Exhibit No. 4 for identification as the testimony the doctor would give in the case if permitted to testify.

153 CECIL JEROME MEDER was called as a witness by the
plaintiff and, having been first duly sworn, was
154 examined and testified as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name, residence and occupation, please?

A. My name is Cecil Jerome Meder. I live at Bashford Lane, Alexandria, Virginia, and I am route man for the Manhattan Laundry and Dry Cleaning Company.

Q. Were you employed by the Cairo Hotel on March 22, 1948?

A. I was employed sometime in March. I don't remember exactly what date.

Q. And you were employed there until about April of that year?

A. That is correct.

Q. Do you recall an occurrence that happened the night of March 22, 1948, or the early morning of March 22, 1948, involving Mr. Liner and Mr. Ersler, who are here in the courtroom?

A. Yes.

Q. Were you there at the time this happened?

A. Yes.

Q. What were your duties there at the hotel at that time?

A. I was the night clerk.

155 Q. * * * How long had you been on the job there about the 22nd of March, 1948?

A. Well, normally I came on duty at 12 o'clock. I had been in the habit of coming a few minutes before that.

Q. Did part of your work consist of auditing the night transcript?

A. That is correct.

Q. What did that consist of doing?

A. Well, it is transcribing all of the day's accounts into one ledger sheet.

Q. In that connection, did you have occasion to use an adding machine tape?

A. Yes.

156 Q. Do you remember Mr. Ersler coming in there and speaking to you on the morning of March 22, 1948?

A. Yes.

Q. What did he say?

A. I don't remember exactly what he said. I don't remember the conversation.

Q. What occurred when he came in or immediately after he came in with reference to work you were doing in checking the adding machine tape?

A. Well, by some method—I don't know how—Mr. Ersler and I were talking and, of course, in the process I was trying to get my work finished and Mr. Ersler got the tape. I don't remember how he got it, whether he asked me for it—I think he did—but that is pretty faint.

Q. And he was checking the figures and you were calling them off the ledger to him there at the time?

A. That is correct.

Q. Because you had to balance at the end of the day or each day had to balance?

A. That is correct.

Q. While you were engaged in that work, did Mr. Liner enter the lobby of the hotel?

A. Yes.

Q. Do you remember which way he came from or do you have any recollection, whether he came from the elevator or from the outside?

157 A. I think it was from the outside. I am not positive.

Q. Did Mr. Liner come around the desk where you were? You were back of the desk, were you not?

A. That is correct.

Q. And Mr. Liner came back to the desk where you were?

A. He came and stood in the doorway behind the desk.

Q. Did he say anything to you at that time?

A. He told me to take the tape away from Mr. Ersler or that he would get me into trouble or something like that.

I don't remember the exact words.

158 Q. What happened then?

A. Well, it is kind of faint. It has been so long ago. Mr. Liner said something to Mr. Ersler from behind the desk and then left and, in the process, I don't know how it happened but I got the tape from Mr. Ersler; whether I took it out of his hand or what, but then, of course, I continued my work. I didn't pay any attention to it and I looked up and Mr. Liner was entering the lobby from the manager's entrance.

Q. Did Mr. Liner go around in front of the desk where Mr. Ersler was?

A. Yes.

Q. Then what happened when they came together in front of the desk?

A. Mr. Liner approached Mr. Ersler and grabbed him by his collar, to my recollection, and I noticed that the pipe hit the floor and then there were two gentlemen there who had come in with Mr. Ersler and they pulled him away from Mr. Ersler.

Q. Where had the pipe been before it hit the floor?

A. Well, it was in his mouth.

Q. In Mr. Ersler's mouth?

A. Yes.

159 Q. What part of Mr. Ersler's body did Mr. Liner grab hold of?

A. No part of his body; his collar, his shirt collar.

Q. Did he grab his tie as well as his shirt?

A. I don't know exactly.

Q. But, anyhow, somewhere up in this vicinity (indicating)?

A. Yes.

Q. Do you remember if his shirt was torn, Mr. Ersler's shirt?

A. No, I do not.

Q. How far away, approximately, were you from where this altercation was taking place there in the lobby of the hotel? Were you still behind the desk?

A. Yes.

Q. About how far in front of the desk was this?

A. I imagine it was three or four feet.

Q. Three or four feet only?

A. I would say it was a bit longer than that from me.

Q. What blows did you see struck there?

A. I didn't see any blows struck.

Q. When these two gentlemen were pulling Mr. Liner off of Mr. Ersler, did Mr. Ersler continue to hold on to him as they pulled him away, dragged Mr. Ersler along too?

A. No, I don't think so.

160 Q. About how long did this take, how much time was occupied in this altercation between them there?

A. Well, it was a very short time; approximately one or two minutes.

Q. Did you take instructions from Mr. Liner there on the job?

Mr. Brault: Object, if Your Honor please; instructions when and how.

Mr. Miller: In connection with your work in any way—

The Witness: Well—

Mr. Brault: Just a moment.

The Court: I think he may answer. It is something within his knowledge. He may answer.

The Witness: Mr. Liner showed me how to complete the transcript at various times.

By Mr. Miller:

Q. And he would come in at night and assist you in starting on the work because you were new at the time?

A. Not at the time that this business happened.

Q. Was Mr. Liner around there at night on occasions too?

A. Sometimes, yes.

Q. When he was around there, would he be on hotel business, doing something that was left over?

A. Most of the time, he would ask me how I was
161 getting along or I would ask him to help me if I was stuck.

Q. You were rather new in the hotel business at the time, at that particular hotel?

A. I was new as far as the transcript was concerned.

Q. Did this altercation continue then across the lobby of the hotel to the elevator?

A. No, sir.

Q. Could you see the elevator, see inside the elevator from where you were behind the desk?

A. Well, I could see a great deal of it.

Q. Do you recall what happened in the elevator immediately after this first altercation?

A. Well, to my knowledge there didn't anything happen in the elevator.

Q. Do you recall the condition of Mr. Ersler's clothing immediately after this happened?

A. I didn't pay any particular attention to it.

Q. What hours was Mr. Liner on duty, usually on duty, do you remember that?

A. Well, his shifts varied. He evidently was on an alternating shift.

Q. Was he around the hotel most of the time?

A. No, I would not say that.

Q. Well, was he around the hotel a considerable time, would you say that?

162 A. Well, of course, the only time that I have any reference to is from after midnight until 8 o'clock in the morning.

Q. Yes.

A. And occasionally, Mr. Liner would come in. I would not say that he was around the biggest part of the time, no.

Q. That is the biggest part of the time between those hours?

A. That is correct.

Q. Did other guests of the hotel along about that time, when they would be around with nothing to do, sometimes help you on checking the adding machine figures?

A. No, sir.

Q. Do you recall or what is your recollection about the ledger sheet there that was being used in checking? Did Mr. Ersler have that in his hand or did you have that?

A. Well, I had it most of the time. There was only one instance that I remember of Mr. Ersler having it and that was after I finished my conversation with Mr. Liner and turned around.

Q. Did you see everything that occurred between the parties, Mr. Liner and Mr. Ersler, while you were there and while they were there in the lobby in front of you? Were you looking at them all the time or were you looking at your work?

163 A. I doubt it very seriously.

Q. You doubt if you saw everything, is that correct?

A. That is correct.

Q. You had your work to do and you were doing it?

A. I didn't pay too much attention to the whole fracas, actually. It didn't seem very important to me.

Q. Is that all you remember about this situation that you have testified to here?

A. I think that Mr. Liner went upstairs or either went upstairs or I am pretty sure he was taken upstairs and then, in a few minutes, he came back down and left the hotel with his friends and that was the end of it, as far I am concerned.

Q. That is all you recall about it?

A. That is correct.

Mr. Miller: That is all.

Cross-examination.

By Mr. Brick:

Q. Did Mr. Ersler ever talk to you about this incident after it happened?

A. The next day, there was something said about it.

Q. What was his complaint the next day, if any?

A. Well, the only thing I recall is that we were talking about the incident and the intent of it and I told Mr. Ersler not to pay any attention to it, that it did not mean anything and then he asked me about his pipe or either I told
164 him about his pipe and that it had been put in one of the key boxes and that just about covers it all.

Q. Did he tell you anything about having his wrist watch being damaged?

A. No, sir.

Q. Did he tell you that he was feeling bad?

A. Well, he didn't mention it.

Q. Did he at any time indicate to you that he had been hit by Mr. Liner?

A. No, sir, he definitely did not tell me that.

Q. If any blows were struck there, would you have seen them?

A. Well, in all probability.

Q. Were you right in front of the spot where this occurrence happened?

A. Yes, that is true.

Q. I wish you would tell us this: Let's say this portion here (indicating) would be the desk counter. You would

be in back of that. Point out to the jury just how far back you were of this counter. Let's say the counter is a broad counter and came here (indicating). How far would you say it was from the counter that the so-called altercation took place? Will you please come down and show us?

A. About between the two chairs here (indicating).

165 Q. That distance. In other words——

A. To between these two chairs.

Q. So it was almost right in front of you, is that correct?

A. Yes, sir.

Cross-examination.

By Mr. Brault:

Q. Mr. Meder, you mentioned on direct examination that the only time you observed anything with regard to the ledger and Mr. Ersler was when you turned around after finishing your conversation with Mr. Liner. What was Mr. Ersler doing then?

A. He was looking at the ledger.

Q. He was reading the items in the ledger?

A. He was looking at it.

Q. Looking at it?

A. Yes.

Q. And that ledger contained the items which included the rates for all the rooms in the hotel, is that right?

A. That is correct.

Q. And payments made by various tenants?

A. Yes.

Q. Do you recall that you came to work at the Cairo Hotel as night clerk on or about March 1 of that year?

166 A. No. I believe it was earlier. I think I graduated from school in January and went to see Mr. Stillson about the job and very shortly after that I was employed.

Q. At any rate, you had been working there at least several weeks when this thing occurred?

A. Yes.

Q. During that time had you had occasion to observe Mr. Ersler while you were on duty?

A. Well, there were quite a few times that he was in the lobby.

Q. What time did you come on duty?

A. Twelve, midnight.

Q. That was your constant shift?

A. Yes, sir.

Q. How frequently did you see Mr. Ersler there in the lobby after midnight?

A. Well, it was quite often. It wasn't every night but it was quite often.

Q. How late would you see him, up to what time?

A. Well, of course, I don't exactly remember the time. The only thing I can go by or use as a gauge, is by the amount of work that was done at the time.

Q. You mean you are speaking of the incident that we have been talking about?

A. That is correct.

167 Q. On other occasions, how late at night would you see Mr. Ersler hanging around the lobby?

A. Well, really I couldn't say how late it was, to tie it down. I would say a couple of hours maybe afterwards.

Q. After you came on duty. That would take it up to around 2 o'clock in the morning?

A. Yes, sir.

Q. And did you ask Mr. Ersler to assist you in reading this tape?

A. No, sir, I did not.

Q. And did you continue to see Mr. Ersler after this incident occurred in the lobby of the hotel?

A. Very seldom. He was in and out once in awhile.

Q. Still after midnight?

A. Well, I had to be there—I wasn't there in the daytime.

Q. I say this shift continued after midnight, midnight to 8 o'clock in the morning?

A. Yes, sir.

Q. So when you saw him, it was after midnight?

A. Yes, sir.

Q. Did he at any time, after this incident occurred, mention to you that he had been injured in any way as a result of this incident?

A. No, sir, he did not.

168 Q. Or make any complaint of any kind to you?

A. Well, I don't remember with real clarity. The only thing is about the pipe. That is the only thing I remember.

Q. That was all he discussed with you, the pipe?

A. Yes.

Mr. Brault: That is all.

Redirect examination.

By Mr. Miller:

Q. Mr. Meder, would it refresh your recollection to read your testimony taken March 19, 1949?

A. Not to too great an extent.

Mr. Brault: What page is that, Mr. Miller?

Mr. Miller: Page 10, the second answer.

By Mr. Miller:

Q. Do you recall this answer:

"Then the two friends that Mr. Liner had with him grabbed Mr. Liner and, if I remember correctly, in a hammerlock they had Mr. Liner's hands back of him like this (indicating)."

Do you remember what they did to his hands?

A. Well, according to my previous testimony, they had him in a hammerlock.

Q. What do you mean by a "hammerlock"?

A. Shall I demonstrate?

Q. Well, you may.

169 A. Just pulled him back like this (demonstrating).

By Mr. Miller:

Q. Before these two friends of Mr. Liner used this hammerlock on him, did they try other ways to pull him off, pull him away, do you remember?

A. I don't remember in what ways. I know that they pulled him away.

* * * * *

177 HAROLD STEVENS was called as a witness by the defendants and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brault:

Q. Dr. Stevens, would you please state your full name and address?

A. Dr. Harold Stevens, 3315 16th Street, Northwest.

Q. And you are a practicing physician in the District of Columbia?

A. Yes, sir.

Q. Doctor, from what medical school did you graduate?

A. University of Pennsylvania.

Q. In what year?

A. 1941.

Q. And following your graduation from the University of Pennsylvania, what has been your training and experience?

A. Prior to graduating from medical school, I received the degrees of Bachelor of Science, Master of Arts and Doctor of Philosophy and Doctor of Medicine in 1941. I was then at the University of Michigan for one year and at St. Elizabeth's Hospital for four and one-half years during which time I was instructor in neurology at George Washington University and, at present, I am an assistant professor at Georgetown University

178 Q. Have you, since your graduation from medical school, specialized in any particular field of medicine?

A. Nervous and mental diseases.

Q. You have restricted your practice to that field?

A. Yes, sir.

Q. Dr. Stevens, are you a member of any organizations of psychiatrists?

A. Yes, sir.

Q. Will you tell us what they are?

A. The American Academy of Neurology; the American Psychiatric Association; Washington Psychiatric Society and a Fellow of the American College of Physicians.

Q. Dr. Stevens, did you have occasion to examine the plaintiff in this case, Mr. Edward Ersler?

A. Yes, sir.

Q. May I ask if you are also a Diplomate of the American Board of Psychiatry?

A. I am a Diplomate of the American Board of
179 Psychiatry, that is correct.

Q. When and where was this examination of Mr. Ersler made by you?

A. I examined Mr. Ersler in my office on April 30.

Q. Of this year?

A. Of 1950.

Q. Would you tell us, briefly, what your examination consisted of?

A. It consisted of an interview of about an hour and a quarter in which the history of the injury was obtained and some past history and observations regarding his present behavior and mental status.

Q. Would you describe to the Court and jury exactly what the plaintiff's conduct was on which you later based an opinion during the course of your examination and I have reference to his responses to certain types of questions as compared to other types of questions.

A. Well, in general, Mr. Ersler was a very tense individual whose most conspicuous symptom was marked preoccupation with his physical complaints which were extremely numerous and, without going into detail, included practically every area of the body and most of the organs. He was highly suggestible in that respect, too.

Q. What do you mean by that, Dr. Stevens, "highly suggestible"?

180 A. Any direct questioning regarding, say, some specific symptom was immediately appropriated. For example, if I were to ask, "Are you dizzy?" "Yes, I am dizzy."

"Do you have headache?" "Yes, I have headache."

"Do you have a pain in the left chest?" "Yes, I have pain in the left chest", so that the list grew extremely long.

The purpose of that was to determine just what degree suggestibility was present and I would say it was present to an inordinate degree.

In addition, many of the answers were vague and so completely irrelevant. He was correctly orientated, that is, he knew the time of day, the place and the purpose of the visit and so on and showed fairly good memory for certain specific events and ability to concentrate and showed normal consecution of thought which seemed to be unimpaired until I made the direct question of the reason for his not working at which time there was considerable change in his manner and he paused and looked perplexed and frowned; then began to demonstrate rather bizarre mannerisms, holding of the head, pursing the lips, clenching the fists which I considered rather bizarre and I presume were attempts to demonstrate considerable mental confusion and obtundity. I was struck by the rather sudden change in his bearing.

This was repeated subsequently.

181 Q. Did he give the same reaction to any other suggestion or any other type of question or did it only apply to the one line of questioning as to why he didn't work?

A. It was specifically to why he didn't work and I believe that was all, yes.

Q. Dr. Stevens, during the course of your examination did you interrogate Mr. Ersler about his previous occupation prior to this alleged incident?

A. Yes. In the course of obtaining a psychiatric history, it is important to do that routinely. It was done here, as it is customarily, and I was unable to get a very clear picture of what the nature of his work was. I was particularly interested in what sort of responsibilities he was carrying prior to the injury since, naturally they would be important in any inference that I might draw regarding his present state and reason for it but I was unable to get any specific answer to the question—what the nature of his work was, the degree of responsibilities, what his duties were, how long they took, what sort of training was necessary for that type of work and other rather pertinent detail, I thought.

I also asked him about the name of his employers, length of duty, compensation and so on and I am afraid I cannot answer your question. I don't know, really, what was done during the several years prior to this episode.

186 Q. In other words, you were unable to elicit from him any specific information regarding his employment for several years immediately preceding this alleged incident?

A. That is correct.

Q. Although you did—did you spend some time in attempting to obtain that information from Mr. Ersler?

A. Yes. As I stated, it is customary to get that information because it is one of the measures that we have of degree of adjustment prior to and after some particular incident and it is of considerable importance to determine what the background, particularly from an occupational point of view, the patient had, the level of adjustment and so on prior to this change in personality.

Q. In other words, Dr. Stevens, were you attempting to ascertain whether he was an adjusted or maladjusted individual?

A. That was one of the objectives in that line of questioning, to find out if he were making an adjustment and, more specifically psychiatrists are interested in levels of adjustment in the social sphere, in the occupational sphere, principally, which gives us an idea to what degree this patient is making a satisfactory integration in his community.

Q. In connection with your history, did you also interrogate him or did he volunteer any information about an alleged incident which occurred at the Cairo Hotel?

183 A. Yes. He was able to give me, in considerable detail, the nature of that incident, the circumstances preceding and following it and, from what I gather, a rather lucid description of the events that happened at that time.

Q. As compared with his answers to your questions directed to the subject of his employment, how would you compare his answers to your questions concerning the alleged incident which he described to you?

A. I was struck with the discrepancy in his ability to give a very vivid description of the incident of the injury in contrast to his inability to give a very accurate account of events that immediately preceded by several months, I mean, and also by several years. As I stated, there seemed to be considerable discrepancy between memory loss

for events prior to this incident and for the incident itself.

Q. Dr. Stevens, were you also concerned with his social adjustment, including his marriage?

A. Yes.

Q. His domestic life?

A. The main categories that I was interested in were his level of adjustment, occupationally, socially and maritally.

I might say again that is customary and no exception was made here. I did not get a great deal of detail about either of those three categories. He told me he was satisfactorily married, and had been for a year and a half;

184 had a previous marriage which resulted in divorce after two years. He is currently married happily to a 33-year old woman who is in good health. The only difficulty is that she has to work in order to support him.

Q. That was his only complaint about his marriage adjustment?

A. Except that he felt some sexual incompetence had recently developed.

Q. Did you interrogate him, Doctor, about the nature of the injuries that he is alleged to have received at the time of this alleged altercation?

A. Yes, sir.

Q. Will you describe what he told you about that?

A. He was in the Cairo Hotel. It was either late at night or early in the morning and was assisting the clerk with his books when someone took some exception to this practice and assaulted him. He was assaulted, according to Mr. Ersler, by two intoxicated men who pulled the pipe out of his mouth and who tightened his necktie around his neck and held him tightly by it and punched him a few times in the stomach, belly or chest. This altercation was finally stopped by some bystander who interceded.

Q. He told you he had been assaulted by two men, is that correct?

A. Yes, sir.

185 Q. Did he describe the injuries that he is alleged to have received?

A. Yes. The pipe was pulled forcibly from his mouth and, as a consequence, he stated he had lost some fillings.

There were bruises, I believe, about the hand, the thumb—I don't recall which hand—but that was about all.

There was no head injury. I specifically inquired about a head injury and Mr. Ersler informed me that there was no blow directly or indirectly to his head.

Q. Did you interrogate him as to whether or not he had sought medical care or whether he required medical care immediately following this assault?

A. I don't have that information. I don't recall it.

Q. This interview, you say, took up about an hour and a quarter of time?

A. I believe that is correct.

Q. He came voluntarily to your office?

A. Yes, sir.

Q. And he had been previously examined by other doctors, hadn't he, Dr. Stevens?

A. Yes; he had been X-rayed by a great many other doctors which he was quite free to tell me about. Most of them I did not enumerate but he had been to see several other doctors.

Q. As a result of your examination and history
186 given to you by Mr. Ersler, did you arrive at any conclusion or opinion concerning his mental or nervous condition?

A. Yes, sir. I believe that Mr. Ersler was suffering from hypochondriasis.

Q. Would you please explain what is meant by that?

A. That is a condition in which the patient has multiple complaints for which there is no physical basis.

Q. In other words, they do not actually exist, they just believe they do?

Mr. Miller: If Your Honor please, I object to that. It is leading.

By Mr. Brault:

Q. When you say they do not actually exist, is that what you said, Doctor?

A. I said these are symptoms and complaints which have no physical basis.

Q. What do you mean by "they have no physical basis"?

A. Well, the most intense scrutiny by a physician would not reveal any evidence of any disordered physiology.

Q. And what do you mean by that expression, "disordered physiology"?

A. There would be no physical disease which could be demonstrated. The function of the various organs would be intact by all known tests and examinations.

Q. In other words, when he complains about the
187 pains and aches and the various organs of his body being upset and not functioning properly, is there any basis for those complaints at all?

A. There isn't any physical basis that could be demonstrated.

Q. Dr. Stevens, were you able to arrive at any conclusion and opinion as to what, in your opinion, was the cause or is the cause of this condition from which Mr. Ersler appears to be suffering?

A. Well, hypochondriasis is a form of psychoneurosis and the exact cause of the psychoneurosis is probably buried in his childhood or many years ago. It might take many, many months of investigation to accurately answer that question.

Q. In your opinion, Dr. Stevens, was there or is there any direct relation or connection between the alleged altercation which occurred on March 22, 1948, at the Cairo Hotel and this neurotic condition with which Mr. Ersler, you say, is at present suffering?

A. I feel there is no connection, no relationship in cause and effect between the accident, the injury and Mr. Ersler's present neurotic symptoms. I believe the neurotic symptoms preceded the incident.

Q. Dr. Stevens, would you explain how you arrived at that conclusion?

A. Mainly from the fact that the nature and the
188 gravity of this injury was not such as to produce this pattern of response.

Q. Is it possible for you or any other neuro-psychiatrist to determine, with any degree of certainty by an examination made some two years following an alleged incident or,

we will take specifically the incident of March 22, 1948, how long this man has been neurotic and suffering from this condition?

Mr. Miller: I object, if Your Honor please. He is asking this witness whether he or anybody else can make a determination.

The Court: I think it should be limited to his own opinion.

Mr. Brault: Very well, I will limit it to you, Doctor.

Mr. Miller: What is the question?

By Mr. Brault:

Q. The question is whether or not you can, as a psychiatrist and an experienced neuro-psychiatrist, with any degree of certainty state, by an examination made in April of 1950, the duration of the condition of which he is now suffering?

A. As I understand your question——

Q. And trace it back to a certain specific date or incident?

A. I am speaking for myself. I could not say how long this condition existed, no.

Q. Dr. Stevens, did Mr. Ersler tell you, when you
189 were examining him about his means of livelihood and occupation, that he was a stock market trader?

A. No, sir. In answer to the specific question as to what he did for a living, he informed me he was unemployed; he was unable to work, as I stated before. I don't know of any work that he did in that period.

Q. Did he tell you or did you ask him what he has been doing since March 22, 1948?

A. Yes, sir.

Q. Did he at any time tell you that he was attending the stock market, brokers' offices, and dealing in stocks during that period?

A. No, sir. Mr. Ersler told me he had great difficulty leaving his apartment and did not like to be with people; found even minimal exertion very tiring. I didn't know he was engaged in any activity.

Q. Did he tell you that he had been engaged as a stock market trader prior to March 22, 1948?

A. No, sir.

Q. If you were told that he had been engaged as a stock market trader both before and subsequent to March 22, 1948, would that alter your opinion and conclusion about this case?

Mr. Miller: If Your Honor please, I object to the question for the reason it is not shown and the witness cannot get the idea and I don't know what he means when
190 he says "stock market trader". Does he mean a person who regularly deals in stocks or a person who deals once or twice with stocks? The idea I get from the question is that he was employed definitely as a trader and I object to it.

The Court: I think the hypothetical question might more accurately reflect the record.

Mr. Brault: I was merely using the words or expression of the plaintiff himself. That was his testimony.

The Court: It seems to the Court that it does not quite reflect the record upon which it should be based.

Mr. Brault: I will withdraw that question and reframe it.

By Mr. Brault:

Q. Dr. Stevens, had you been told by Mr. Ersler that both prior and subsequent to March 22, 1948, it had been his practice to go in and out of stockbrokers' offices frequently and almost daily for the purpose of buying and selling stocks or watching the stock market, would that, in any way, influence you or change your conclusion and opinion of his case?

A. Well, it would fortify my opinion that this is a psychoneurosis.

Q. Would it influence or change your opinion as to the causal relation between the incident of March 22, 1948, and his present mental and nervous condition?

A. It would serve to substantiate my belief that the
191 injury had nothing to do with his present symptoms.

Q. Dr. Stevens, if you had been told by Mr. Ersler at the time you examined him that he did not consult a phy-

sician until 18 days after the incident occurred and then after a suggestion made by an attorney whom he consulted, would that influence or change your opinion as to the causal relation between the incident of March 22, 1948, and his present condition as you have found it?

A. Again, I can say it would further strengthen my conviction there is no causal relationship between the injury and the subsequent symptoms.

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199 Redirect examination.

By Mr. Brault:

200 Q. Dr. Stevens, was there anything else in the history or background of this patient that you learned from him or from your examination that might have some bearing on his alleged hypochondriatic condition?

A. Well, as I stated, to precisely answer that question, answer it accurately with conviction would take many months. It is an important question, of course, because, in the treatment of any patient, it is necessary to find out what is back of it. As I stated, in my opinion, the injury is unrelated. Therefore, it must be something else.

We have a history of an unsatisfactory marriage but, of course, that does not mean everything. The second marriage is allegedly satisfactory although there is considerable disparity in the ages of himself and his wife which I feel should be investigated further to determine if there are elements of duress in that relationship. I would suspect so but I am only speculating.

Q. Do you believe that this pending litigation has any bearing on this man's response to questions propounded to him by psychiatrists that examined him, that is, yourself?

A. From my own observation, I am compelled to say yes. I think there is considerable influence of the pending litigation and the surrounding circumstances and so on which has a great deal to do with his behavior.

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203 OSCAR HUGH FULCHER was called as a witness by the defendants and, having been first duly sworn, was examined and testified as follows:

204 Direct examination,

By Mr. Brault:

Q. Dr. Fulcher, will you kindly state your full name and address, please, sir?

A. Oscar Hugh Fulcher, 1150 Connecticut Avenue, Northwest.

Q. Are you a practicing physician in the District of Columbia?

A. Yes, sir.

Q. And how long have you been so engaged?

A. I have been licensed here since 1935. I did not enter the private practice here until 1937.

Q. Dr. Fulcher, will you please detail your education and training and experience as a physician?

A. I got my medical degree from the University of Virginia in 1926. I interned in the Virginia Mason Hospital in Seattle, Washington, from 1926 to 1927. Then I was a Fellow at the Mayo Clinic from 1928 to 1933 and, since then, I was in the Navy for five years and have taken short post-graduate courses.

Q. Dr. Fulcher, would you tell us what degrees you have received from various universities?

A. Well, I have a Bachelor of Science degree from William and Mary College; M. D. degree from the University of Virginia; an M. S. degree in surgery from the
205 University of Minnesota and a C. S. degree from the American Society of Surgeons.

Q. What is that?

A. Fellow of the American College of Surgeons.

Q. Dr. Fulcher, have you specialized in any particular field of medicine?

A. Yes, sir.

Q. Will you tell us what field of medicine you have specialized in?

A. Neurological surgery.

Q. Have you confined your practice to that specialty?

A. Yes, sir.

Q. For how long?

A. Since about 1937.

Q. And has the training that you detailed been directed to that particular subject?

A. Yes. I am certified by the American Board of Neurological Surgery.

Q. What other organizations are you a member of?

A. I am a Professor of Neurological Surgery at Georgetown and I belong to the Cushing Neurological Society, the American Medical Association, the District Medical Society, Southern Medical Association, Washington Academy of Surgeons and several others.

Q. Did you, at my request, examine the plaintiff in 206 this case, Mr. Edward Ersler?

A. Yes, sir.

Q. Would you please first tell us just exactly what, in a layman's language, is meant by neurological surgery?

A. Neurological surgery is the study of diseases of the brain, spinal cord and peripheral nerves and the treatment of those conditions by surgical procedures.

Q. Would you explain what you mean by "peripheral nerves"?

A. Peripheral nerves are those nerves which come from the spinal cord out through the openings in the backbone and go to the skin and muscles of the hands, feet, and body and also there are certain special types of peripheral nerves known as cranial nerves which go to the skin and the muscles of the face.

Q. Does that take in the field of all the nerves in your body?

A. Yes, sir.

Q. And all those nerves are known as peripheral nerves?

A. There are another bunch of nerves you might classify called the sympathetic nerves which also come under our domain.

Q. Does your specialty include the treatment, diagnosis and study of all the nerves in the body?

A. That is right, sir.

207 Q. And is not restricted to any particular type of nerves?

A. No, sir, any nerve tissue, we deal with their functions both in disease and in health.

Q. Dr. Fulcher, when and where did you examine Mr. Ersler?

A. I examined him on April 20, 1950, in my office at 1150 Connecticut Avenue, Northwest.

Q. How much time did you give to Mr. Ersler at the time of that examination?

A. Well, I usually do not time an examination. I give adequate time to arrive at a conclusion. I would say it would probably be approximately two hours.

Q. And he was with you during the course of your examination for about two hours, is that correct?

A. That is right, sir.

Q. Would you describe briefly just what your examination consisted of; just how you went about examining Mr. Ersler?

A. Well, the first part of the examination consisted of getting a history from the patient, of getting his description of what had happened and getting his description of how he had suffered.

The second part of the examination consists of having the patient disrobe or undress and actually going through
208 certain procedures to determine the functions of the various nerves which I have previously mentioned.

Q. Would the second part of your examination be connoted as a physical examination?

A. Yes, sir, a neurological physical examination.

Q. Now then, will you tell us briefly the history that was given to you by Mr. Ersler when he came to your office on April 20, 1950?

A. He stated that about two years previous he had been attacked in the lobby of the Cairo Hotel. He stated that he had returned from getting something to eat and was talking to the clerk when the assistant manager approached him, grabbed him by the necktie, tightened the necktie and there was some type of struggle, scuffle.

After this, he went up to his room and laid down but did not go to sleep for several hours. He stated that there was no beating about the face or the scalp; that he had not been

knocked unconscious during this encounter and that he did not call a physician at that time.

Several days later, he noticed that he had some soreness of his right hand and he stated that he hurt all over.

Q. In the course of your examination, did you attempt to get the background of Mr. Ersler as to his economical background and so forth? Were you interested in that at all?

209 A. Yes, sir. I had learned that he had not worked any since the accident. I was very much interested to know how he had spent his time prior to the accident.

Q. Were you able to find out?

A. I said "accident." I meant prior to this encounter.

Q. What information did you obtain from him as to his activities prior to this incident?

A. I was unable to comprehend the chronological order of events. I learned that he had previously worked for the Government and had stopped working for the Government. I learned that he had graduated from the University of Wisconsin in engineering and had worked for a short while in Chicago, but either I was unable to understand his description of his economical experience or he was unable to remember it sufficiently to answer my question.

Q. Did he appear to experience any difficulty in recalling the details of the particular incident that he is complaining about?

A. He appeared to correct himself after telling me, for instance, what he had done. He would think awhile and would conclude that perhaps he had, that the statement had been erroneous.

Q. After he had told you something, he told you he was mistaken and that it was wrong?

A. Yes.

210 Q. Then you made a physical examination, is that correct?

A. Yes, sir.

Q. Would you describe just exactly what you do in the course of that physical examination?

A. The patient, after the history is obtained, is requested to disrobe. I usually start by observing first the contour of the skull, observe whether there are any scars on the

scalp, whether there is any evidence of a depression in the skull. These were observed and it was determined that the contour was normal and there existed no scars of the scalp or of the face.

The pupils of the eyes appeared to be normal. Then I looked back behind the pupils at the fundi. This revealed no evidence of any pressure behind the eyes. In case of swelling of the brain, there exists, as a rule, signs which would make the presence of that swelling known by looking into the eyes. The hearing was normal. He was able to move the tongue, wrinkle the forehead, all the first tests demonstrating the functions of the cranial nerves were done and these nerves were functioning in proper order.

The motion of the cervical spine or the motion of the neck was normal in all directions. The muscles appeared to have normal strength. There existed no evidence of any paralysis of any groups of muscles. Likewise, there
211 were no areas of numbness over the face, body or extremities which indicated that the sensory nerves were likewise properly functioning.

Then there are little responses that one gets by tapping on certain tendons called reflexes. The various reflexes thus determined responded in a normal manner. In cases of injuries, there may be certain reflexes which would indicate some injury to the nerves or spinal cord or to the brain. These reflexes were tested and they were not present. In other words, the abnormal reflexes were not present.

Tests were done for coordination, like touching the nose with the finger and for recognition of objects with the hand, with the eyes closed like, take this cup and recognizing it with the eyes closed. These were properly executed.

Also, I did some tests on the mental reactions to determine whether or not there was any organic mental defect resulting from probable injury to the brain. These tests were properly performed so, from these studies, I was able to arrive at a very definite conclusion.

Q. Would you tell us, Dr. Fulcher, what opinion and conclusion you arrived at as the result of your complete neurological and physical examination?

A. Yes, sir. It was my opinion that there existed no evidence of any injury to the brain, to the spinal cord, to the

212 cranial nerves or the peripheral nerves. In other words, there existed no evidence of any injury to the central or peripheral nervous systems.

Q. Dr. Fulcher, did you find any evidence of any injury to any parts of his body at all during the course of your examination?

A. No, sir. The only other part of the body that had been injured, according to this history, was the hand, the right hand and, at the time of my examination, this right hand was functioning normally.

Q. Did you find any injury to his neck or throat?

A. No injury to the neck or throat.

Q. Or the head?

A. None to the head.

Q. Or to the chest?

A. None to the chest.

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217 Q. Dr. Fulcher, if, at the time of your examination, there had been present any physical cause for dizziness, would you have found it from your examination?

A. Yes, sir.

Q. Was there any cause, physically or neurologically, was there anything about this patient which could possibly cause him to be dizzy at the time you examined him?

A. No, sir.

Q. Did he at that time claim that he was dizzy?

A. He must have. I have it down here in my history but it was among the complaints he had. Incidentally, sometimes that is what my secretary gets and lists
218 in this history sheet so, when my secretary elicited that or whether that was elicited by me I don't know but that was one of his complaints.

Q. What is your recollection now as to what his chief complaint was at the time of your examination, Dr. Fulcher?

A. Well, I recollect it now as being not only of dizziness but he was "sick all over".

Q. Did you find any physical basis at all for any of these complaints?

A. No, sir. There existed none.

Q. There existed none whatsoever?

A. That is right.

219 SCOTT STILLSON was called as a witness by the defendants and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brault:

Q. Would you please state your full name and address, sir?

220 A. Scott Stillson, 1336 Eye Street.

Q. What is your occupation, Mr. Stillson?

A. Manager of the Parkside Hotel.

Q. Were you ever employed at the Cairo Hotel here in Washington?

A. Yes, sir.

Q. Do you recall during what period of time you were employed there?

A. Two years; 1948 and part of 1949.

Q. You were there for two years?

A. 1947-1948.

Q. And in what capacity were you employed at the Cairo Hotel?

A. As manager.

Q. During that entire two-year period?

A. Yes, sir.

Q. And, as manager of the Cairo Hotel, you, of course, were acquainted with Mr. Liner, were you?

A. Yes, sir.

Q. Was he employed there at the hotel?

A. He was.

Q. Do you recall about what time he came to work at the hotel?

A. He was there when I went there.

Q. That was in 1947?

221 A. Yes.

Q. In what capacity was he employed there?

A. Room clerk.

Q. And was he ever employed in any other capacity?

A. No, not during my time.

Q. Mr. Stillson, what were the duties of the room clerk?

A. To room guests, collect bills at the desk, handle things from back of the desk.

Q. Did he have any particular hours or shifts?

A. Yes, he had his regular shift.

Q. Do you recall what that shift was?

A. Well, it was part of the time through the day and sometimes at night. It was not always the same.

Q. Between what hours would the shifts run?

A. It would be eight hours. It would be from 8 to 4, I think, and from 4 to 12.

Q. When he completed his shift say, from 4 to 12 at midnight, did he have any other duties to perform or was he free to leave?

A. No, he was off duty.

Q. He was off duty after midnight?

A. He was free to leave, that is true.

Q. Were you also acquainted with Mr. Edward Ersler, the plaintiff in this case?

222 A. Yes.

Q. How long had you known him?

A. During the period of time that I was there.

Q. While you were manager of the Cairo Hotel, Mr. Stillson, did you reside there in the hotel?

A. Yes, sir.

Q. So that you spent most of your time there?

A. A good deal of the time, most of the time, yes, sir.

Q. And during that period of time that you were there, did you have occasion to observe Mr. Ersler at all?

A. Well, yes.

Q. How frequently would you see him?

A. Almost every day, I would say.

Q. Did you have any opportunity to observe his physical appearance, his mannerisms or the type of person that he was?

A. Yes.

Q. Did you form any conclusion, as the result of your daily observation——

Mr. Miller: I object, if Your Honor please, for the same reason that they objected.

The Court: I think that is calling for a conclusion.

By Mr. Brault:

Q. Would you describe these things or mannerisms that you observed in regard to Mr. Ersler as you saw him daily over a period of two years?

223 Mr. Miller: I object, if Your Honor please.

The Court: I think this has been ruled on before with the testimony of the plaintiff's witnesses and I think I will sustain the objection.

By Mr. Brault:

Q. Did you have any knowledge of an altercation or an incident which occurred on March 22, 1948?

A. Yes, sir, I heard of it.

Q. When did you learn about it?

A. The following day, I think.

Q. And did you see or have any conversation with Mr. Ersler the following day?

A. I don't know whether it was the following day or not. He spoke to me about it. It might have been later than the following day. I am not sure.

Q. Do you recall about what he said to you?

A. Well, he said that he had had some trouble with Mr. Liner. I don't remember much of the details of it.

Q. Did he make any specific complaint to you of anything as the result of this particular incident?

A. Well, he mentioned he had broken his pipe or something of that kind.

Q. Did Mr. Ersler continue living in the hotel after that?

A. Yes, sir.

224 Q. How frequently, following this incident, did you have occasion to see and observe Mr. Ersler?

A. I guess every day, practically, the same as always.

Q. When did you leave the Cairo Hotel?

A. It was in November, November 1, 1948, I think.

Q. The November following the March 22 of the incident?

A. That is right, following the incident.

Q. And between March 22, 1948, and November when you left the Cairo Hotel, did Mr. Ersler at any time make any complaint to you about having received any injury in this altercation?

A. No, sir.

Q. Did he ever mention it to you? Did you have any conversation with him?

A. I don't think he mentioned it to me but that one time.

Q. Did you have subsequent conversations with Mr. Ersler?

A. I don't recall that I did.

Q. You did see him daily?

A. Practically.

Q. Did you notice any change in his habits of being in and out of the hotel as compared to what it was prior to March 22, 1948?

Mr. Miller: I object, if Your Honor please.

225 The Court: I will sustain the objection.

By Mr. Brault:

Q. Did you see him as frequently after March 22, 1948, as you did before?

A. Practically the same as before, as I remember, yes, sir.

Q. And when you saw Mr. Ersler, was it at a particular time of the day or was it at night or any other time?

A. Well, he was in and out at intervals during the day, no particular time that he came in and out. As I remember, he used to come in at different times.

Q. Do you recall now, Mr. Stillson, what shift Mr. Liner was working on the night of this incident?

A. I think that he was working that night until midnight. I am not sure of that, however.

Q. That is your recollection. Mr. Stillson, do you recall whether or not you suggested to Mr. Liner that he should apologize to Mr. Ersler for this incident?

A. Yes, I did.

Q. That was after Mr. Ersler had spoken to you about it?

A. Yes, sir. He told me that he had done that afterwards; Mr. Liner did.

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231 CYRIL STEPHEN NELSON, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brault:

Q. Would you state your full name and address, please?

A. Cyril Stephen Nelson.

Q. And where do you live?

A. 130 Rhode Island Avenue, Southwest.

Q. And you were not born in the United States?

A. No.

Q. Where were you born?

A. British West Indies.

Q. How long have you been in the United States?

A. About four years now.

Q. Have you ever been employed by the Cairo Hotel?

A. Yes.

Q. When did you go to work for the Cairo Hotel?

A. Approximately three years.

Q. Are you still working there?

A. Yes.

Q. So you have worked there for the past three years?

232 A. Yes.

Q. In what capacity?

A. As an elevator operator and also a switchboard operator.

Q. You are a student?

A. Yes.

Q. Do you go to school?

A. Yes, Howard University.

Q. What shift have you worked as an elevator operator?

A. 11:30 to 7:30.

Q. Has that always been your shift?

A. Yes.

Q. That is 11:30 at night?

A. Yes.

Q. Until 7:30 in the morning?

A. Yes.

Q. Are you acquainted with the plaintiff in this case, Edward Ersler?

A. Yes.

Q. And do you know where he lives.

A. Yes.

Q. Where?

A. I think 500 Cairo Hotel.

Q. Was he living there when you went to work for the Cairo Hotel?

233 A. Yes.

Q. Is he still living there?

A. I will say yes.

Q. Do you recall an incident which occurred on the night or early morning of March 22, 1948?

A. Well, when you say "recall", what do you mean?

Q. Do you recall there was an incident that occurred on that night?

A. Yes.

Q. Were you on duty that night?

A. Yes.

Q. And you came to work at what time?

A. 11:30.

Q. Did you see Mr. Ersler that night?

A. Yes.

Q. At what time?

A. I would say around 2:30 to 3:00 o'clock in the morning.

Q. And had you seen Mr. Ersler on prior occasions at that hour in the morning?

A. I can't recall that.

Q. Would you tell the Court and jury just what you observed, if anything, occur out in the lobby?

A. Well, I know absolutely nothing of that case—

234 Q. Did you have knowledge of some incident that occurred in the lobby?

A. A very faint one.

Q. What is that?

A. A very faint one.

Q. Did you see Mr. Ersler? You said you saw him some-time between 2:30 and 3:00 o'clock in the morning.

A. That is right.

Q. Where did you see him?

A. On the elevator.

Q. What did you observe when he came on the elevator?

A. Nothing.

Q. Did you see Mr. Liner?

A. Yes; I saw Mr. Liner.

Q. Did Mr. Liner come on the elevator with Mr. Ersler?

A. No.

Q. Did anyone operate the elevator that night between 2:00 and 3:00 o'clock other than yourself?

A. Not to my knowledge.

Q. Did anything occur on the elevator between Mr. Liner and Mr. Ersler?

A. Not to my knowledge.

Q. When Mr. Ersler came on the elevator, where did you take him?

A. Took him up to the fifth floor.

Q. That is where he lived?

235 A. That is right.

Q. Did he make any statement to you?

A. All I heard him say was "Son-of-a-bitch tear my shirt".

Q. Was anyone else in the elevator at that time?

A. No.

Q. He was by himself?

A. That is right.

Q. Mr. Liner didn't follow him in the elevator?

A. No.

Q. Did you observe Mr. Ersler at that time? Did you look at him?

A. No.

Q. What is that?

A. No.

Q. Did he make any other statement?

A. No, that is all. Neither did I answer him.

Q. You said nothing to him?

A. That is right.

Q. Has he at any time since then ever made any statement to you about having been injured or struck by Mr. Liner?

A. No.

Q. Did he tell you that night he had been struck by Mr. Liner or anyone else?

A. No.

236 Q. Did either Mr. Ersler or Mr. Miller or both talk to you in the last few days?

A. Mister who?

Q. Mr. Ersler or Mr. Miller discuss this case with you?

A. Both of them spoke to me.

Q. You gave them the same information?

A. That is right.

237 JOSEPH T. DIXON, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brault:

Q. Will you state your full name and address, please, sir?

A. Joseph T. Dixon, 6208 32nd Street, Northwest.

Q. What is your occupation?

A. I am Secretary-Treasurer of the T. F. Schneider Corporation.

Q. How long have you been so engaged?

238 A. I have been with them since 1933, except for four years in Service.

Q. Four years Military Service?

A. Yes, sir.

Q. And, as such, in such capacity, are you in charge of the records of the T. F. Schneider Corporation?

A. I am.

Q. Are those records kept under your direct supervision?

A. They are.

Q. Are you also acquainted with the Cairo Hotel?

A. I am.

Q. That is owned by the T. F. Schneider Corporation?

A. It is owned by the T. F. Schneider Corporation. At the present time, it is under lease to another corporation.

Q. On March 22, 1948, was it operated by the T. F. Schneider Corporation as a hotel?

A. It was at that time.

Q. Are you acquainted with the co-defendant in this case, Mr. James P. Liner?

A. I am.

Q. And do you have your records on Mr. Liner's employment with you?

A. I have, sir.

Q. Is this the record you refer to, Mr. Dixon?

239 A. That is the payroll record, a recap of all the payroll sheets.

Q. Would you mind identifying and removing from that book the record that pertains to Mr. Liner?

A. This is a recap which is maintained for purposes of record and also for purposes of Social Security. It shows that Mr. Liner—

Mr. Brault: Before telling us what it shows, I would like to have it identified.

(Record of T. F. Schneider Corporation was marked Schneider Corporation Exhibit No. 1, for identification.)

Mr. Brault: I would like to offer this as Defendant Schneider Corporation Exhibit No. 1, if Your Honor please.

Mr. Miller: No objection.

(Defendant Schneider Corporation Exhibit No. 1 was received in evidence.)

By Mr. Brault:

Q. Mr. Dixon, would you kindly tell us what that record shows with respect to the date when Mr. Liner came to work for your company and the day he left your employment?

A. He was employed September 10, 1946, continuous employment until the time when we leased the hotel which was on May 23, 1948.

Q. In other words, you leased the hotel to someone else on that date?

240 A. That is correct, sir.

Q. And did all employees of the hotel automatically terminate their employment?

A. With our company, but the majority of them were retained by the new corporation.

Q. What was his capacity?

A. Employed as room clerk.

Q. Was he ever employed in any other capacity?

A. No, sir.

Q. Do you have a record showing when Mr. Stillson was employed by the Cairo Hotel?

A. Yes, sir.

Q. Will you look at your records and tell us the date when Mr. Stillson came to work for the hotel?

A. Mr. Stillson was employed December 1, 1946. His employment terminated the same date we leased the hotel, May 23, 1948.

Q. So that both Mr. Stillson and Mr. Liner were employed from the date their employment began until the time that you leased the hotel in May, 1948?

A. That is correct.

Q. What was Mr. Stillson's capacity?

A. He was Resident Manager.

Q. Did you have supervision over the hotel?

A. I did, sir.

241 Q. And its employees?

A. I did, sir.

Q. Do you know whether or not Mr. Liner had any regular working hours, or were his working hours irregular?

A. They worked a shift of eight hours. However, one week they would work from 8:00 to 4:00. The next week it would be 4:00 to 12:00. Mr. Liner also had worked as night auditor, in other words, from 12:00 to 8:00.

Q. Then he had eight-hour working shifts?

A. That is correct.

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247 JAMES PATRICK LINER, a defendant, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brick:

Q. What is your full name, Mr. Liner?

A. James Patrick Liner.

Q. Where do you reside?

A. 1530 North Lancaster, Arlington, Virginia.

Q. Who do you reside there with?

A. My mother.

Q. Do you help support and contribute to your mother's support?

A. Yes.

248 Mr. Miller: I object. I don't see where that has any bearing on the issues in this case, whether he does or not contribute to his mother's support.

The Court: It may stand.

By Mr. Brick:

Q. Mr. Liner, at the present time where are you employed?

A. Wardman Park Hotel.

Q. What position do you hold at the Wardman Park Hotel?

A. Night auditor.

Q. How long have you been employed at the Wardman Park Hotel?

A. Since July 1, 1948.

Q. How long have you been doing hotel clerical work?

A. Ever since I got out of the Service in '44.

Q. How long were you in the Service?

A. A little over four years.

Q. As a result of your time in the Service, did anything happen to you?

Mr. Miller: If Your Honor please, I object to that question. It has no bearing at all on the issues in this case.

Mr. Brick: It has a lot of bearing on this case. Here is a claim of an assault——

The Court: The witness may answer.

The Witness: Yes, something happened.

249 By Mr. Brick:

Q. Tell us very briefly what happened.

A. I got shot and lost a leg.

Q. Which leg was that?

A. My left leg.

Q. Where is that cut off?

A. Just above the knee, just about there (indicating).

Q. Mr. Liner, did you carry any insurance at all to cover a situation like this?

A. None whatsoever.

Q. So that if any judgment is procured against you, it will be against you personally?

A. Yes.

Q. And will be attached against any property that you might have, is that right?

A. Yes, sir.

Q. Mr. Liner, when did you go to work for the Cairo Hotel?

A. Sometime in September of '46. I don't remember the exact date.

Q. And at the time you went to work at the Cairo Hotel, did you meet the plaintiff in this case, Mr. Ersler?

A. Sometime after I went to work there I did, yes.

Q. How frequently would you see him, on an average?

A. I would see him every day, I would say, that
250 I was there.

Q. What shift would you mainly be working?

A. Well, right after I went there I first worked the 12:00 to 8:00 shift, the night shift.

Q. And you say you used to see Mr. Ersler there every night?

A. Yes.

Q. And did there come a time, during that time, that you ever had any discussions with Mr. Ersler?

A. Yes, there were a number of times.

Q. Will you tell the Court and jury just what those discussions were about, usually?

A. Well, it seemed to me that he was pretty nosey. One time he started to go into the manager's office and I told him that was not his place to be, and he was always looking at the switchboard trying to find out, it looked like, trying to see who was calling who in the hotel, and I told him he was too nosey and to stay away.

Q. On how many occasions did you tell him that?

A. I wouldn't know; a couple of times or more.

Q. Do you recall what time you were working on March 22, 1948?

A. I was working the 4:00 to 12:00 shift.

Q. What time did you go off duty that day?

251/ A. I went off duty that day about twenty minutes of twelve because Mr. Meder came in early and relieved me.

Mr. Miller: You mean March 21?

The Witness: Yes, about twenty minutes of twelve.

By Mr. Brick:

Q. Mr. Meder came on duty and took your place?

A. Yes.

Q. And Mr. Meder is the gentleman who testified here yesterday?

A. That is right.

Q. After that, where did you go?

A. Well, as soon as we got off, the reason Mr. Meder came early was there were a couple of friends waiting for me in the cocktail lounge and I went in and had a beer and then we went out to get something to eat.

Q. Who were these friends?

A. Mr. Roper and Mr. O'Day.

Q. Where is Mr. Roper at this time?

A. Weisbaden, Germany.

Q. How long has he been over there?

A. About two years.

Q. Where is Mr. O'Day at the present time?

A. I think he is in Baltimore. I don't know.

Q. Did you make an effort to get both of them to get here and testify?

A. I made an effort to get Mr. O'Day. I wrote Mr. Roper about it.

Q. They haven't replied to your request?

A. No, that is right.

Q. That is the reason?

A. Mr. O'Day, in fact, said he would be here this morning at 9:30, but he wasn't.

Q. Tell us what time you saw Mr. Ersler that particular morning.

A. Well, I don't know definitely what time it was but, as I said, we had stayed in the cocktail lounge until midnight when it closed, and then we had gone out down to a little waffle shop down by the river and had something to eat, and I think we had ridden around the Tidal Basin afterwards. I would say we had been gone two hours, at least, if not more.

Q. What did you do when you got in the hotel?

A. I was only going to be there a minute. I didn't bother to park my car. I had something up in Mr. Roper's room or something, I think a suit, and I was going up to get it. We came in and I saw Mr. Ersler standing over with Mr. Meder and he had an adding machine tape in his hand.

I walked behind the desk and called Mr. Meder back and told him not to let Mr. Ersler see any of the stuff, that he was awful nosey.

Q. How long did you talk to Mr. Meder then?

A. Just about as long as it took me to say it right there.

253 Q. When you turned around, did you see Mr. Ersler?

A. Yes; he had laid the adding machine tape down and had turned the transcript sheet around and was looking at it.

Q. What is that?

A. A large sheet. It is a balance brought forward from the previous day, if there is a balance; room rent, local phone calls, long distance, restaurant, valet, any charges.

Then you have your credits where anyone has paid anything and the closing balance on how much they still owe.

Q. Is that a confidential record?

A. I would say it is, yes.

Q. Is it customary to let guests see that record?

A. No, they are not supposed to see it.

Q. Tell us what happened after that, in your own words.

A. Well, I walked around from behind the desk and Mr. Ersler was still standing there, so I walked up to him and told him to get away. I don't know, that has been a long time ago, but we had a couple of words and I grabbed hold of him.

Q. Where did you grab him?

A. Right up here, like that, more or less.

Q. What happened at the time you grabbed him?

A. Well, I grabbed him, and I guess we just struggled a little bit, and the first thing I knew Mr. Roper had hold of me from the back and pulled me off.

254 Q. Did you strike any blows on Mr. Ersler?

A. No, sir, I didn't hit him.

Q. Did you pull him very hard?

A. No, I don't think I pulled him very hard.

Q. Did you garrote him, pull his tie up?

A. No.

Q. To make it look like a cowboy's noose around the neck?

A. No. When I grabbed it, I may have twisted it, but I didn't pull on the tie.

Q. What did he do?

A. With one hand he grabbed hold of this hand, and he grabbed the other hand.

Q. How long did this entire scuffle or melee take?

A. I wouldn't say it took two minutes.

Q. What did you see, if anything, that had happened to Mr. Ersler during that scuffle?

A. Well, I noticed that when I was talking to him, he had a pipe in his mouth and afterwards he didn't have, and that is about all I did notice.

Q. Did you notice anything about his watch?

A. No, I didn't.

Q. Did you notice anything about his shirt?

A. No, I didn't notice anything about that.

Q. Do you know whether you tore his shirt or not?

255 A. That I don't know for sure.

Q. When Mr. Roper pulled you off, what happened then?

A. Well, he told Mr. Ersler that he had better get on the elevator and go upstairs, and he did. I started over there and Mr. Roper grabbed me and said, "No, let him go up and we will go up on the next one when it comes back down", which we did.

Q. You are positive you didn't go on the same elevator that he did?

A. Not the same elevator. I mean the same elevator but not at the same time.

Q. You didn't try to pull him off the elevator, did you?

A. No, I didn't. I couldn't. Mr. Roper had hold of me, and he is a big man.

Q. How big is Mr. Roper?

A. He is about six one, and weighs about 200 pounds.

Q. Did you then go up in the elevator and go to Mr. Roper's room?

A. That is right.

Q. What did you do after that?

A. I got whatever I had up there. I think it was a suit. Then I came down and got in my car and went home.

Q. Was anything said to you that night before you left the hotel about this incident?

256 A. Not a thing.

Q. When was the next time you heard anything about it?

A. I think it was the next morning.

Q. Did you see Mr. Ersler at that time?

A. Yes, I did.

Q. Where did you see him?

A. I was at the desk.

Q. What happened? Tell us exactly what happened.

A. He asked me if I thought I didn't owe him an apology, and I told him I didn't, that there wasn't enough to it. He said "All right". He wanted to know if Mr. Stillson,

the manager, was there, and I said "Yes". He went back to see Mr. Stillson and I didn't see him—I might have seen him a couple of times that day, but not to talk to.

The next day, when I did see him, Mr. Stillson had talked to me and he said he thought I had better apologize. He had told Mr. Stillson what damage I had done. He did not tell me. I offered to pay for his shirt and his pipe, and I said I would take care of his watch, and at that time he seemed all right.

Q. Did he complain he was injured?

A. No, sir.

Q. Did you see any swelling or bruises on his hand or about his body?

A. No, sir.

257 Q. Did he tell you he had a swollen hand?

A. No, sir.

Q. Did he tell you he was bruised about the body?

A. No, sir.

Q. When is the next time after that that you talked to Mr. Ersler about this incident?

A. You mean after——

Q. After you offered to pay for the shirt and watch and pipe.

A. Never.

Q. Has he ever said anything to you about it?

A. Never.

Q. As far as you were concerned, was it still an open affair?

A. What do you mean by that?

Q. I mean by that, did you still think that he was making any claim against you or the hotel?

A. No. I thought when I told him to get another shirt and get his watch fixed and pipe and let me know how much it was, that I would pay for it, I thought that was the end of it.

Q. Did he indicate he was satisfied at the time?

A. He didn't say yes and he didn't say no.

Q. When was the next time you heard anything about this?

A. I don't know; whenever I was served with a warrant.

258 Q. You mean served papers in this case?

A. Yes.

Q. Will you tell the Court and jury what your observations of the conduct of Mr. Ersler were from the time you first met him at the Cairo Hotel up to the date of this incident?

Mr. Miller: I object to that, Your Honor. That is irrelevant. He saw him for a period of over two years.

Mr. Brick: If Your Honor please, Mr. Miller had the plaintiff's wife testify as to what she had observed, and I submit, since he saw him nearly every night, he could tell what type of person he was, what his mannerisms were. Mr. Liner is the defendant in this case, and here is a man making a claim that he is so nervous and was not before this incident and he saw him and observed him so he certainly has a right to testify to that.

The Court: He may testify to what he saw.

Mr. Brick: That is all I am asking.

The Court: His conclusion as to whether he was nervous or not would be incompetent.

By Mr. Brick:

Q. Tell us what observation you made of the conduct of the plaintiff around the hotel, not your conclusions, but what you saw.

A. As I say, I worked nights there when I first
259 came to work for awhile, and then we had a spell there, just before this incident, that we couldn't keep the night auditors so I worked in his place until we got Mr. Meder and he was around all hours of the day and night. Whenever I was on duty, I always saw him.

Q. Did he ever appear to you to be regularly occupied at any particular business?

A. I don't see how he could be. He was up all night.

Q. And what would he be doing around the hotel lobby that you observed?

A. Nothing; talking to people is about all.

Q. After the incident, you were there from March 22 until June 23 of that same year?

A. I think it was around June 25, some time after this new organization took over.

Q. You had opportunity to observe his conduct from March 22 until you left the Cairo Hotel?

A. Yes.

Q. Will you tell us what you observed from March 22 on?

A. I never saw any change.

Q. In other words, he was carrying on the same course of conduct?

A. The same, yes, sir.

Q. After March 22 as he did before?

260 A. Yes, sir.

Q. Have you noticed him carry anything around this courtroom the last day or so?

A. Yes. I saw him carry Mr. Miller's big briefcase out last night.

Q. Did he seem to have any difficulty carrying that out?

A. Not a bit.

Cross-examination.

By Mr. Brault:

Q. Mr. Liner, you had gone off duty at twenty minutes of twelve that night?

A. Yes, just about twenty minutes of twelve.

Q. Do you know what time this incident occurred?

A. Well, as I say, we stayed in the cocktail lounge there until midnight drinking beer, and then we went out to eat and we were gone at least two hours, I know.

Q. So it was after 2:00 o'clock?

A. Yes, sir.

261 Q. When you came back to the hotel, was it your intention to go back to work or go on duty?

A. No. If I had, I would have parked my car some other place except right in front.

Q. Were you on duty at the time this occurred?

A. No.

Q. You were off duty?

A. Yes, sir.

Q. And had you formed any animosity or grudge or anything of that sort toward Mr. Ersler prior to this time?

A. Yes.

Q. You had?

A. Yes.

Q. You disliked him, is that correct?

A. One incident that occurred before is what caused it.

Q. What incident prompted you to dislike Mr. Ersler?

A. Well, at the time Jimmy Fontaine's was open and some of the gamblers, the house men were staying there and one of them got off early and he came home. He knew his wife was out with someone else and he started out with a gun and Nelson—no, it wasn't Nelson, it was the boy before him——

Mr. Miller: I object to this, if Your Honor please. This is all irrelevant and immaterial to this proceeding.

Mr. Brault: I never knew anything about this. I don't know what you are referring to.

262 The Witness: I was telling——

By Mr. Brault:

Q. Just a moment. We are not concerned with anything that occurred to anybody else.

A. I was telling how I happened to have possession of the gun. We were looking at it that night and Mr. Ersler wanted to look at it, and he wanted to take it apart. I said that it wasn't mine and there was no reason to take it apart. He asked me if I reported it to the police, and I said "No", and the next day the police were there to see me.

Q. You had taken possession of the gun for safe keeping?

A. I had taken it so he wouldn't go out and shoot someone.

Q. Had you had other experiences with Mr. Ersler that caused you to develop a dislike for him?

A. He was just nosey, that is all.

263 Q. Did you break in Mr. Meder when he was new on the job?

A. Well, I don't know whether you call it breaking him in. I taught him, instructed him.

Q. He wasn't familiar——

A. He wasn't familiar with that type of transcript. Every hotel has a different type of transcript.

264 Q. When you took the action to keep Mr. Ersler from knowing what was on this sheet of paper that you described, the transcript, you did that because you felt

that he was unnecessarily prying into the business of your employer, the corporation, is that right?

A. I just felt it was none of his business.

Q. And it was for the purpose of protecting your employer in that regard, that is——

A. Not the employer; other people in the hotel, not the employer.

265 Q. That is right, other people in the hotel. In other words, you felt it was your duty, as an employee, to keep the information about the guests from prying eyes?

A. I figured it was none of his business which it wasn't.

Q. And it was to protect the other guests, as well as keeping the hotel from perhaps getting into difficulty?

A. More or less protect Mr. Meder because, if they found out, Mr. Meder might have lost his job over it because he is not supposed to show that to anyone.

Q. While you were on the job yourself, did you occasionally permit people to check back adding machine tapes with you when you had a long list of figures to check?

A. I have had the bellboys help me, yes.

Q. Just what were they doing when you walked in, Mr. Liner, to the hotel lobby?

A. At the time, the minute we walked in they were just standing there. They stopped doing whatever they were doing.

Q. Did Mr. Ersler have this adding machine tape?

A. He had the adding machine tape, yes.

Q. Mr. Meder was looking at the transcript or had the transcript before him?

A. That is right.

Q. And then when you went back, you called Mr. Meder aside or away from the counter and told him you
266 wanted to speak to him a minute?

A. That is right.

Q. And he went back out of hearing of Mr. Ersler and he talked in a low voice?

A. Yes. It is approximately from here to you.

Q. You talked in a low voice?

A. That is right.

Q. And it was then at that time you noticed Mr. Ersler turning this transcript around to look at?

A. No, not until after I got through talking to Mr. Meder.

• • • • •

269 Q. And would you do anything that the usual hotel clerk would do to take care of the convenience and look after the comfort of the guests at the hotel that they normally asked you to do?

A. Yes, sir.

Q. And there were different rates for similar rooms there, were there not, at that time?

A. Oh, yes.

Q. In other words, a person in 400 might be paying a different rate than the person in 300 although the rooms were the same because of other factors?

A. Yes. Take Mr. Ersler, he was on a monthly rate and he paid much less than a person in Room 400 would pay, but Rooms 400 and 500 were identical.

Q. And persons who came there a long time back, say in 1941, might not be paying as much as those who came in afterward?

A. Definitely.

Q. Mr. Ersler came there around 1940?

A. I don't know. I wasn't there.

Q. In other words, there was a different rate on various rooms in the hotel and the manager of the hotel had authority to make adjustments in rental rates of different rooms, in fact, on all the rooms of the hotel, didn't he?

270 A. Yes. You see, usually in the summertime when business is slow they offer special rates to induce people to come in, special weekly rates and if they come in in the summertime, naturally they will get it at a lower rate than if they came in in the wintertime.

Q. The idea of keeping the hotel occupied as full as possible of guests, is that correct?

A. Yes.

Q. This hotel is quite a—do you have any idea what percentage of the guests there are resident guests, that is, staying by the month? Some of them had been there for years, haven't they?

A. I wouldn't know any more. I used to know.

Q. Would you say it was as much as 50 percent resident guests there the year around?

A. No, I would not.

Q. 25 percent, probably?

A. I would say it was between 25 and 50.

Q. And quite a few Government employees stayed there who are along in advanced years?

A. Yes, and quite a few retired employees.

Q. There is quite a large lobby there. I don't mean a lobby but a room where the guests gather?

A. More or less of a parlor or whatever you want to call it, writing room.

271 Q. It is considerably larger than this courtroom?

A. Well, it is just about twice as large, half of it on one side and half on the other side.

Q. And there are chairs and benches there and people come in and sit and talk?

A. That is right.

Q. And people who have been there a long time come in and talk with each other and some of them used to sit outside at that time and you had benches outside?

A. That is right, benches out on the porch.

Q. Didn't you frequently stop in the hotel when you were not on actual duty, that is, on your regular duty hour?

A. Yes; I had friends there, like Mr. Roper and Mr. O'Day. There were quite a number of others.

Q. There is a cocktail lounge and there is the night club right in the same building?

272 A. That is right.

Q. As you would go in, would you pass the time of day with Mr. Meder from time to time?

A. Well, it depends whether he was on duty or whoever was on duty.

Q. If he was stuck on a problem or didn't know just what to do, he would ask you about it and you would straighten him out?

A. Give him a hand; help him out.

273 JOAN PILCHER was called as a witness on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brick:

Q. What is your full name?

A. My full name is Mrs. Richard L. Pilcher, Joan Pilcher, P-i-l-c-h-e-r.

Q. And where do you reside, Mrs. Pilcher?

A. 108 Park Avenue in Falls Church, Virginia.

Q. Do you know the defendant, Mr. Liner, over there?

A. Yes, I do.

Q. How long have you known him?

A. I have known him for two and one-half years.

Q. Do you know other people who know him?

274 A. Yes.

Q. What is his reputation for peace and good order?

Mr. Miller: If Your Honor please, I object to the question. I do not see where character witnesses are proper in a case of this kind.

Mr. Brick: This is an assault case. We have a right to show his reputation for peace and good order and truth and veracity.

The Court: I think I will permit the witness to answer.

By Mr. Brick:

Q. What is Mr. Liner's reputation for peace and good order?

A. Very good. His mother is a teacher in our school and he is a very devoted son to his mother and wonderful with the children.

Q. What is his reputation for truth and veracity?

A. Very good. We have never had any occasion to doubt his word.

Mr. Brick: You may inquire, Mr. Miller.

Cross-examination.

By Mr. Miller:

Q. When you say "our school", what school is that?

A. The Evergreen School in Falls Church.

Q. What kind of school is that?

A. It is a little private school.

275 Q. What does his mother make as a salary?

A. What does his mother make?

Q. Yes.

A. Must I answer that? It is not my business to disclose her salary.

Q. I think it is important in this instance.

Mr. Brick: I don't think it is important at all.

The Court: I don't know what point you have in mind.

Mr. Miller: May counsel approach the bench, if Your Honor please?

The Court: You may.

(Thereupon, counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Miller: If Your Honor please, Mr. Liner has testified that he supported his mother.

Mr. Brick: I asked if he helped support her.

Mr. Miller: He brought that in issue. This witness is in a position to know——

Mr. Brick: It is not proper. She is not his witness and he has gone beyond the scope of the direct examination.

Mr. Miller: I will make her my witness for that purpose.

The Court: How much the mother makes is not proper.

276 Mr. Miller: It would not have been necessary to bring it in if he had not gone into the fact he was supporting his widowed mother, if Your Honor please, and that is the purpose of the question.

The Court: I do not think it is proper.

277 WILMA BROGAN McPHERSON was called as a witness by the defendants and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brick:

Q. What is your full name, Mrs. McPherson?

278 A. Wilma Brogan McPherson.

Q. Where do you reside, Mrs. McPherson?

A. At 6201 18th North, in Arlington, Virginia.

Q. Do you know Mr. Liner, the defendant, who sits over there?

A. I do.

Q. How long have you known him?

A. Four years or thereabouts.

Q. Does your husband also know him?

A. Yes, he does.

Q. Do you know other people who know Mr. Liner?

A. Yes.

Q. Will you please tell us what his reputation for peace and good order is?

Mr. Miller: The same objection, if Your Honor please. If I may, without taking the time of the Court to repeat it, I would like to have a continuing objection to all the character witnesses' testimony.

The Court: Overruled.

By Mr. Brick:

Q. You may answer.

A. I have never heard anything against Mr. Liner. His reputation, so far as I know, is very excellent.

Q. What is his reputation for truth and veracity?

279 A. It would be the same. I don't know anything against him.

Mr. Brick: You may inquire, Mr. Miller.

Mr. Miller: No questions.

Mr. Brick: May this witness be excused?

The Court: You may be excused.

(Witness excused.)

The Court (McLaughlin, J.): Members of the jury:

It now becomes my duty to instruct you in the law that applies to this case, and it is your duty to follow the law as I shall state it to you.

At the very outset I should like to impress upon you the fact that the persons who compose the jury are as much a part of the court as the court itself,—your work is every bit as important as the work of the Judge who presides at the trial.

It is your function, and your responsibility in this case, as in every other case on which you might sit, to resolve the evidence and arrive at what we call the ultimate or final facts; and, in arriving at the final facts apply the law as given you by the Court to those facts, and to do justice between the parties. In that connection, you should weigh the evidence presented here in open court, of course, without bias, prejudice, or sympathy toward one side or the other.

As jurors, you are the sole judges of the credibility of the witnesses,—that means, their worthiness of belief, and in that connection you can take into consideration their attitude and demeanor upon the witness stand; their ability to recall the facts and circumstances concerning which they have testified; their frankness or lack of it; their bias
 309 or prejudice if such may be made manifest, and their interest in the outcome of this case, and to give their testimony only such weight as you, the jury, think under all the circumstances it is entitled to.

Now you are not to reach your determination on the mere basis of the number of witnesses who have testified for one side or the other. Nor are you to disregard the testimony of any witness as a result of whim or fancy. You are instructed that the testimony of one witness, entitled to full credit, is sufficient for the proof of any fact and may justify a verdict even if a number of witnesses have testified to the contrary, if, upon the whole case, considering the credibility of witnesses as I have explained that term to you, and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and the honesty of one witness. You will try this case solely

on the evidence presented in open court on the witness stand. It is your duty and sole responsibility to resolve any conflicts of evidence in this case.

The burden of proof is on the plaintiff to sustain his aspects of the case by what we call a "fair preponderance" of the evidence. The term "preponderance of evidence" means such evidence as, when weighed with that opposed to it, has more convincing force. A party has succeeded
 310 in carrying his burden of proof on an issue of fact, if the evidence favoring his side of the question is more convincing than that tending to support the contrary side, and if it causes you, the jurors, to believe that on that issue the probability of truth favors that party.

This is an action brought by the plaintiff, Edward S. Ersler, against the defendant, T. F. Schneider Corporation and the defendant, "Red" Liner. Incidentally, the name "Red Liner" is not the official name of the defendant Liner and the plaintiff's attorney has asked permission to amend his petition and to change the name wherever "Red Liner" appears to "James Patrick Liner" as Mr. Liner testified his name to be. There is no dispute about that, that the defendant's name is James Patrick Liner and he so stated, but it was called "Red Liner" when the petition was filed and throughout my instructions I have used the name "Red Liner" which you know is identical with James Patrick Liner.

To repeat, this is an action brought by the plaintiff, Edward S. Ersler, against the defendant, the T. F. Schneider Corporation and the defendant, Red Liner, in which the plaintiff seeks to recover damages against the defendants for injuries alleged to have been suffered by the plaintiff as the result of an assault alleged to have been committed upon the plaintiff by the defendant, Red Liner, in the lobby of the Cairo Hotel in the early morning hours of March 22, 1948.

311 The plaintiff alleges that the defendant, Red Liner, was then an agent, servant, and/or employee of the defendant corporation, T. F. Schneider Corporation, and that at the above time and place he assaulted plaintiff without cause or justification in a malicious manner, wrenching

plaintiff's pipe from his mouth, grasping plaintiff's clothes and twisting his arm and wrist and otherwise mistreating plaintiff.

Plaintiff claims that at the time of the assault, he was assisting a night clerk employed by the defendant, Schneider Corporation, at the Cairo Hotel, at the request of the night clerk.

Both the defendants, T. F. Schneider Corporation and defendant Red Liner claimed that at the time of the acts relied on by the plaintiff, the defendant, Red Liner, was off duty as a desk clerk and was not engaged in any business of the defendant, T. F. Schneider Corporation, and that at the time of the happening of the alleged assault, the defendant, Red Liner, was acting without authority and outside the scope of his employment by the defendant, T. F. Schneider Corporation.

Now this action is brought against two defendants. However it does not follow from that fact alone that if one is liable, both are liable. Each is entitled to a fair consideration of his own defense. The defendant Liner has been sued individually on the theory that since he
312 committed the alleged assault he is liable for the result of his own actions. The defendant T. F. Schneider Corporation has been sued on the theory that the defendant Liner was acting as its servant or employee and within the scope of his employment at the time of the events out of which the alleged assault occurred. Whether the facts support this theory is an issue that you have to decide, inasmuch as the plaintiff's contentions in this respect have been denied.

First: You must determine whether or not the defendant Liner is guilty of an assault upon the plaintiff. If you find this in the negative, then you must render a verdict in favor of both defendants.

Then you must go one step further, and you must determine whether the defendant Liner was acting within the scope of his employment, as I shall define the term for you, when he committed the assault, assuming you find he committed the assault. If you find that he was not so employed,

then you must find for the defendant T. F. Schneider Corporation.

You are instructed that, as a matter of law, an employer may be held responsible in tort for assaults committed by an employee. However, in order that such liability may be established two conditions must have been found to have existed. First, the plaintiff must show that at the time of the incident which occurred the individual was in the employ or service of the employer; and second not
 313 only must he have been in the employ but when he committed the tort he must have been acting within the scope of employment, as such will be defined. If you find that these two conditions are met, then, as a matter of law, the employer is liable notwithstanding the employee may have acted wantonly or maliciously.

You are instructed that "scope of employment" means that the person alleged to have been so employed has acted within the line of duty, that is, in his employer's service or in the course of his service in the transaction of his employer's business or in the furtherance of his employer's interest. If you find that the act of the agent was within such a scope, then the employer may be held accountable even though the servant acted wantonly, recklessly or without order.

If you find that defendant Liner assaulted the plaintiff as a result of personal animosity and that such assault was not an act within the course of his service or in the transaction of his employer's business, or in the furtherance of the employer's interest, as above explained, then the employer may not be held accountable.

I am going to define the act of assault for you as it has been defined by this court. It is an attempt with force or violence to do a corporal injury to another. Now not every touching or bumping of another is an assault. But the
 314 act which tends to bring about the injury must be accompanied at the time the act is committed by an intention, coupled with the present ability, to use actual violence against the other person. If you find that the defendant Liner at the time he acted had the intention to use violence, and that at the time he acted he had the ability

to use violence, then you have established the elements of an assault.

Now this is a civil case, and like all other civil cases the burden of proof rests upon the plaintiff to prove all the essential elements of his case by a preponderance of the evidence. By a preponderance of the evidence is meant that he must establish his case by the greater weight of the evidence. By this is meant such evidence as, when weighed with that opposing it, has more convincing force and from which it results that the greater probability of truth lies. It is your function as the jury to weigh all the evidence which has been introduced in this case. If in so doing you find that the evidence is of as much credibility and weight on one side as it is on the other, or if you think that the defendant has established his defense by the greater weight of the evidence, then the defendant must prevail. If you believe that the plaintiff has sustained his burden by this greater weight of the evidence, then you must find for the plaintiff.

Certain witnesses have testified in the trial of this
315 case as expert witnesses.

A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound, and you are further instructed that if any conflict in the expert testimony exists, it is your duty to reconcile the testimony, if you can, but if you cannot do so, then you have a right to believe the witnesses whom you deem most worthy of credit and disbelieve those least worthy of credit, and in weighing the testimony of the experts, as all other testimony, it is proper for you to take into consideration all the surrounding circumstances of the witnesses, their interest in the result of the action, if any, and their opportunities of knowing the truth of the matter about which

they testify as experts, and their willingness to expound fairly in reference to their expert knowledge.

The burden of proof is upon the plaintiff to establish the elements of his damage. The amount of your verdict must be based upon the evidence as to the plaintiff's
 316 injuries and losses. You are not to award to the plaintiff speculative damage, that is, compensation for future detriment which, although possible, is remote, conjectural or speculative. In other words, you are to base your verdict as to future losses, if you reach such a verdict, not upon conjecture or speculation but only as a preponderance of the evidence shows that there is a reasonable certainty that there will probably be future damage or suffering resulting from the original injury. Absolute certainty of prospective continuation of injury or loss need not necessarily be established. It is sufficient if the probability of that damage occurring is reasonably certain, in which event allowance should be made therefor.

The damages, in such a case as this,—if you find for the plaintiff,—must be in such amount as will, in your judgment, fairly, fully and reasonably compensate the plaintiff for any personal injuries which may be found by you to have been suffered by him,—no less and no more than that amount.

In computing the amount of any damage to plaintiff's property, which you may find plaintiff to have suffered, you will consider the value of the property damaged, if same is not capable of being repaired, but if the property is capable of being repaired, you will consider the damage as the
 amount necessarily expended to repair the property.

317 In computing the amount of damages for personal injuries, if you find such to have been suffered by plaintiff, you will consider the plaintiff's out-of-pocket expenses for medical services. You may consider whether, as a result of this accident, and the personal injuries that he sustained thereby, if you find he sustained any such injuries, he incurred any additional expenses in connection with his work. If he did, you may include such amounts in your verdict; and you may also add a suitable sum, a sum you consider suitable, to compensate him for his pain and suffering, if any such you find.

If you find that he sustained permanent injuries, then you should include in your verdict an appropriate sum as compensation for the permanent injuries that you may find.

Of course, I do not mean that in your verdict you must particularize or itemize all these matters. Your verdict,—if it is for the plaintiff,—will be for a specific sum that you will specify—but, in arriving at that sum, you may consider all of the items that I have enumerated in the light of all the evidence.

If your verdict is for the plaintiff, the amount of the verdict is left to your sound discretion, but, in that event, your award must be just and reasonable, and must be based upon the evidence introduced. It means that your judgment may not be arbitrary or fanciful, but must have evidence
318 behind it.

The jury is instructed that should it find that any party or witness has knowingly testified falsely about a material matter on which he or she could not reasonably have been mistaken, then the jury is at liberty to disregard all or any part of the testimony given by such witness or party.

You are instructed that if the court has said or done, anything which has suggested to you that it is inclined to favor the claims or position of either party, you will not permit yourselves to be influenced by any such suggestion.

I have not expressed, not intended to express, nor have I intimated nor intended to intimate, any opinion as to what witnesses are, or are not, worthy of credence; what facts are, or are not, established; or what inferences should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

If, in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

Upon retiring to the jury room you will select one
319 of your number to act as foreman, who will preside

over your deliberations. You should approach the issue of this case as men and women of affairs, in the manner in which you would approach any important matter that you have occasion to determine in the course of your everyday business. Consider it in the jury room deliberately and carefully, in the light of the instructions which I have given you, and use the same common sense and same intelligence that you would employ in determining any important matter that you have to decide in the course of your own affairs.

As of course you are aware, your verdict must be reached by unanimous vote.

You will now retire with the Marshal.

No. 10,769

BRIEF OF APPELLEE, JAMES PATRICK LINER

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term, 1950

FILED DEC 14 1950

EDWARD S. ERSLER,

Appellant,

v.

T. F. SCHNEIDER CORP., a Corporation, and
JAMES PATRICK LINER,

Appellees.

Appeal from the United States District Court
for the District of Columbia

ALBERT BRICK,

*Attorney for Appellee,
James Patrick Liner,
517 Denrike Bldg.*

COUNTERSTATEMENT OF QUESTIONS PRESENTED

In the opinion of this appellee the questions are those contained in Brief of Appellee, T. F. Schneider Corporation, which Brief has been adopted by this appellee and submitted as a part of this brief.

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BRIEF OF APPELLEE, JAMES PATRICK LINER

Appellee, James Patrick Liner, by his attorney, Albert Brick, adopts the Brief of Appellee, T. F. Schneider Corporation, in toto and submits the same as a part of his reply to the Brief of Appellant.

In addition thereto, appellee submits the following argument as to appellant's Point 3.

ARGUMENT

3. Evidence That Appellee Helped Support His Mother Was Admissible On Question of Punitive Damages.

The question of punitive damages was not ruled out by the trial court until all the testimony was presented and the court was considering instructions to the jury. The trial court did discuss the question of punitive damages at the close of plaintiff's case, but made it clear that such discussion was premature (Tr. 172) and all the court did was to state what its ruling would be unless something to the contrary was presented (Tr. 176). Such a statement could not be considered a ruling of the court excluding the question of punitive damages. So long as the question of punitive damages was in the case, evidence as to appellee's financial circumstances was entirely proper. See:

Brown v. Evans,
17 F. 912, 914 (CCA Nev.), Cert. Den. 3 S. Ct. 83.
"The reason of the rule is obvious. If exemplary damages may be given by way of punishment . . . the jury must know something, at least, of the defendant's ability to respond in damages, since what would be a severe verdict to one with limited means might be but a trifle to one of large means, and the rule utterly fail."

See, also:

Maxa v. Neidlein,
163 Md. 366, 368, 163 A. 202 (1932).
"While the first of the plaintiff's granted prayers referred only to compensatory damages, but nevertheless permitted the pecuniary circumstances of the defendant to be considered, which, as said in *Stockham v. Malcolm*, *supra*, are pertinent only where punitive damages are in issue, yet, as further held in that case, the granting of a prayer in that form is not ground of reversal when, as here, the plaintiff's testimony, if true, supports the theory that exemplary or punitive damages are allowable."

Furthermore, it is significant to note that in the decision from this District, quoted by Appellant, *Traver v. Smolik*, 43 App. D. C. 150, this Court limited its holding to a case involving only compensatory damages, not punitive damages.

Thus we submit that the admission of this evidence was not only not prejudicial, but was entirely proper under the circumstances.

Respectfully submitted,

ALBERT BRICK,

Attorney for Appellee,
James Patrick Liner,
517 Denrike Bldg.

**BRIEF FOR APPELLEE T. F. SCHNEIDER
CORPORATION.**

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1950.

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 10769 FILED DEC 15 1950

EDWARD S. ERSLER, *Appellant,*

Joseph W. Stewart

CLERK

v.

T. F. SCHNEIDER CORP., A Corporation, and JAMES
PATRICK LINER, *Appellees.*

Appeal from the United States District Court for the
District of Columbia.

ALBERT E. BRAULT,

DENVER H. GRAHAM,

Attorneys for Appellee,

T. F. Schneider Corporation,

801 Transportation Building,

Washington, D. C.

COUNTER STATEMENT OF QUESTIONS PRESENTED

In the opinion of corporate Appellee the questions are:

- I. (a) Where proffered evidence discloses no causal connection between an alleged assault and an alleged heart condition, and no claim of injury to the heart nor of aggravation of a pre-existing heart condition was ever made by appellant, did trial court abuse its discretion in refusing evidence as to an alleged heart condition?
- (b) Did trial court abuse its discretion in excluding evidence from certain lay witnesses as to appellant's inability to work when such lay witnesses had no opportunity to know appellant's ability in that respect?
- (c) Is exclusion of such evidence prejudicial, even if erroneous, where jury found defendants not liable for any damages?
- II. Where appellant claims a severe and vicious assault by employee of corporate appellee, is admission of evidence as to employee's reputation for peace and good order prejudicial error?
- III. Where appellant claims punitive damages, is admission of evidence as to financial circumstances of employee defendant prejudicial error?
- IV. Where there is no evidence that employee was on duty at time of alleged assault, did trial court err in refusing to give instruction relating to punitive damages against employer?
- V. Where jury heard three full days of evidence and all questions of fact were submitted to it under proper instructions, did jury, as a matter of law, commit error in finding for both defendants?

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IN THE
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OCTOBER TERM, 1950.

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EDWARD S. ERSLER, *Appellant*,

v.

T. F. SCHNEIDER CORP., A Corporation, and JAMES
PATRICK LINER, *Appellees*.

Appeal from the United States District Court for the
District of Columbia.

**BRIEF FOR APPELLEE T. F. SCHNEIDER
CORPORATION.**

**COUNTERSTATEMENT OF THE CASE BY APPELLEE
T. F. SCHNEIDER CORPORATION.**

This appellee feels that certain errors in Appellant's Statement of the Case should be corrected and certain material omissions included. Thus, it deems it necessary to

include a Counterstatement of the Case, based on all the evidence, and not only on the testimony of appellant.

It is conceded that appellant came to live at the Cairo Hotel, owned by this appellee, in 1941 and that he was in the lobby of the hotel in the early hours of March 22, 1948. Whether Meder, the night clerk, asked appellant to help him check some figures is a disputed question of fact, since Meder, as appellant's witness, testified he didn't know how appellant got the tape used for auditing the night transcript, but he thought appellant asked him for it (App. 56, 62). Meder was behind the desk and appellant stayed in front of the desk in the lobby.

While appellant and Meder were checking the figures, Liner, a *room clerk* at the hotel (App. 81), who had been off duty more than two hours drinking beer and eating with friends, returned to the hotel to get a suit out of a friend's room, parking his car out front while he went up (App. 92, 93, 98).

The evidence is unequivocal and undenied that Liner was a *room clerk* at the Cairo Hotel, yet appellant's brief calls him "night auditor." The testimony referred to in support of this statement (App. 90) shows that *at the time of the trial* Liner was *night auditor* at the *Wardman Park Hotel*, a hotel having no connection with the T. F. Schneider Corporation.

Liner went to the door behind the desk and called Meder over and told him not to let appellant see the figures (App. 56, 93). Liner then went to the front of the desk in the lobby (App. 56, 57, 94); had a couple of words and then grabbed hold of appellant. Liner denies striking appellant with any blows (App. 94), and Meder, who was standing in front of both of them, saw no blows struck.

Appellant further claims that Liner followed him into the elevator and grabbed his right thumb and attempted to pull him out of the elevator (App. 12), yet Cyril Nelson, the elevator operator who took appellant upstairs after the

incident, testified that nothing occurred on the elevator; that Liner did not follow appellant into the elevator; and that all appellant said about the incident was that Liner had torn his shirt (App. 86).

It has always been denied that appellant received any beating, let alone a severe and vicious one. It is not denied that appellant went to Dr. Stevenson, but it should be noted that appellant testified on cross examination that he went to see a lawyer first and that the lawyer told him to see a doctor. He also testified that he first saw a doctor 18 days after the incident complained of (App. 28).

It is not denied that appellant went to Dr. Glenn, a heart specialist, but Dr. Glenn and another heart specialist, Dr. Holtzman; were unable to find any condition of the heart caused or aggravated by the alleged assault (App. 8, 9, 46-54).

It is not denied that appellant consulted other physicians and was examined by them. Two of these physicians, testifying for appellant, stated he was suffering from "hypochondriasis" (App. 89, Tr. 137) which is a "condition in which patient has multiple complaints for which there is no physical basis" (App. 69).

Appellant continued his regular work as a stock market trader every day after the incident (App. 17-23).

After the incident was brought to the attention of the manager, he asked Liner to apologize (App. 82, 96), which was done and the incident closed. Appellant made no complaint to the manager about a beating; he complained only about a broken pipe (App. 82). After the apology, the incident was apparently forgotten by all concerned, because although appellant continued to live in the hotel and see the manager almost daily he never again mentioned it to anyone connected with the hotel (App. 62, 83, 87). The next time the hotel heard about it was after June 18, 1948, when suit was filed. This was after T. F. Schneider Corporation had leased the hotel to a third party (App. 88).

SUMMARY OF ARGUMENT.

1. The United States District Court for the District of Columbia properly excluded testimony relating to Appellant's alleged heart condition because there was no allegation or showing of a causal relationship between the alleged injury and the alleged heart condition. The United States District Court did not err in excluding testimony of lay witnesses as to Appellant's inability to work following the alleged assault, in that the lay witnesses whose testimony was excluded had no knowledge of the type of work Appellant did and were not in sufficient contact with Appellant to give competent testimony thereto.

2. The United States District Court for the District of Columbia did not commit prejudicial error in allowing evidence relating to Appellee Liner's character and reputation and financial situation, because, in a sense, Liner's character and reputation were in issue, and testimony relating to his financial situation was competent and proper at the time it was introduced. Further, these alleged errors relate only to Appellee Liner and not to the corporate Appellee.

3. The United States District Court for the District of Columbia did not err in ruling that punitive damages did not apply to the corporate appellee, because there was absolutely no evidence that the individual appellee was acting as servant, agent or employee of this appellee in the scope of his employment at the time of the alleged assault, or that the corporate Appellee directed, authorized or ratified the acts of the individual Appellee.

4. The verdict of the jury was not contrary to the evidence nor weight of the evidence nor contrary to law.

ARGUMENT.

1. The Court Did Not Err in Excluding Testimony Relating to Appellant's Alleged Heart Condition; and Did Not Err in Excluding Testimony of Lay Witness as to Appellant's Inability to Work.

At no time, from the moment of the alleged assault until Dr. Glenn took the stand at the trial, was there any contention that Appellant suffered damage or injury to his heart. The Complaint alleges "severe injuries to his mouth and teeth" and that Appellant "suffered great and permanent bodily injury" and "suffered great pain of body and mind." (App. 2) The Pretrial Proceedings show the Appellant made claim only for permanent injuries to the nerves. (App. 2) The entire record is totally devoid of any claim of injury to the heart, or of aggravation of a pre-existing heart condition, or of aggravation of any pre-existing condition.

Appellant lays great stress on the cases cited, yet a close scrutiny of these cases shows that in each incidence a traumatic relationship exists between the trauma suffered and the injury resulting. "If such injuries can be traced to the act complained of, and are such as would naturally follow from the injury, they need not be specifically averred." *Montgomery v. The Lansing City Electric Railway Company*, 103 Mich. 46, 61 N. W. 543.

However, the converse is also true, as is pointed out in *1 Chitty on Pleading* 386:

"Whenever the damages sustained do not necessarily arise from the act complained of, and consequently are not implied by law, in order to prevent surprise of the defendant, which otherwise might ensue on the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it."

Appellant's own physician, Dr. Leland E. Stevenson, testified that there was no physical basis for Appellant's

complaints (App. 46). Dr. Harold Stevens, a neurologist, examined the Appellant and testified, as witness for Appellee, that Appellant was suffering from "hypochondriasis", which he explained as a "condition in which the patient has multiple complaints for which there is no physical basis" (App. 69). Dr. Stevens further testified that, "the most intense scrutiny by a physician would not reveal any evidence of any disordered physiology" and that he felt there was "no connection, no relationship in cause and effect between the accident, the injury and Mr. Ersler's present neurotic symptoms." He believes "the neurotic symptoms preceded the incident." (App. 70). Dr. Hyman David Shapiro, also a neurologist, testified for Appellant that he was suffering from "hypochondriasis" (Tr. 89). Dr. Ray F. Guynn, a psychiatrist, also testified for Appellant and stated that he was suffering from "hypochondriasis" (Tr. 137).

Dr. J. Russell Verbryche, Jr., a gastroenterologist, testified, without objection, to the condition of Appellant's digestive system because Dr. Ray F. Guynn, a psychiatrist, was willing to testify that Appellant's nervous condition affected his stomach. No doctor was willing to testify, or even made any suggestion, that Appellant's nervous condition affected his heart.

It should be noted that at no time was there any claim or suggestion (or proffer by attorney for Appellant) that there was any causal relation between the alleged heart condition and the alleged assault, or that the doctors, whose testimony was excluded, would testify that the alleged heart condition was caused by the alleged assault. Under these circumstances, no useful purpose could have been served by this testimony, and it was rightfully excluded by the trial court.

Further, the Court did not err in excluding lay testimony of Appellant's inability to work.

Appellant's witness, Chester L. Carr, testified that he had "almost daily contact" with Appellant from April, 1941 until September, 1942; that he saw him "very infrequently after that"; and that he has seen him only "two or three times" a year for "several hours" each time in a "social way only" since March, 1948 (Tr. 113, 114). Obviously, he could not testify as to whether Appellant was able to work because he saw Appellant infrequently. This was the reason Carr's testimony was excluded, as was explained by the Court (Tr. 114).

Appellant's witness, Charles W. Ashe, saw Appellant "most every evening" (R. 37) and was allowed to testify concerning changes in Appellant's appearance, demeanor and physical condition. These are physical phenomena which any lay witness may observe and testify to. However, ability to work, in a case like this, where the person is suffering from "hypochondriasis", calls for expert witnesses on a subject which is purely psychiatric.

Appellant's expert witnesses were permitted to testify, without objection, to his ability to work.

This Appellee believes that the case of *United States v. Woltman*, 61 App. D. C. 52, 57 F. (2d) 418, relied upon by Appellant to sustain this argument, is not in point. That case involved a claim against the United States on an insurance policy for alleged total disability, where a layman could undoubtedly, by observation, testify as to whether or not a person appeared to be physically disabled.

Chicago & N. W. Ry. Co. v. Green, 164 F. (2d) 55, is cited by Appellant to uphold the proposition that "It is competent for any witness to testify from observation that a person appeared to be in pain." That rule of law is not questioned by this Appellee, but it is submitted that testimony relating to pain is not the issue here. The issue here is ability to work. Nevertheless, that case contains a most

enlightening statement concerning the issue, where on page 63 the Court says:

“It is within the discretion of the trial court in an action under the Federal Employer’s Liability Act to allow a nonprofessional witness, *familiar with the nature of plaintiff’s work* and having observed his performance of his duties after the accident, to testify that he appeared to be unable to perform certain of his tasks . . . ” (Italics added).

Even assuming that the Court was in error in excluding the evidence referred to in Part One of Appellant’s Argument, still such error could not have possibly been prejudicial in view of the jury’s verdict in favor of the defendants. Exclusion of evidence on the question of damages is not prejudicial error if a jury has found that the defendant is not liable for any damages, as was decided by the jury in the case at bar.

This Court has so held in a recent decision in the case of *Maude J. Underwood v. Capital Transit Company*, — App. D. C. —, —, F (2d) —, No. 10265, decided on May 29, 1950, wherein Judge Clark, speaking for the Court, said:

“Assuming for the purposes of this opinion that the lower court erred in withdrawing certain evidence pertaining to appellant’s injuries from the jury’s consideration, it would still be impossible for that to be prejudicial error in view of the fact that the evidence relating to these injuries had nothing to do with the defendant’s liability, (an issue on which the jury found for the defendant), unless indeed the court did so prejudice the jury in his instructions to them in this regard that he in effect left them no alternative but to find for the defendant.”

In view of the foregoing, this Appellee feels the Court committed no error in excluding the testimony objected to.

2. The Court Did Not Commit Prejudicial Error in Allowing Evidence Relating to Appellee Liner's Character and Reputation and Financial Situation.

Appellee T. F. Schneider Corporation feels that the errors alleged in Parts 2 and 3 of the Argument in Appellant's Brief do not relate to it, since they are peculiarly indigenous to Appellee Liner. Certainly the jury had no doubts as to the financial responsibility of the corporate Appellee, particularly in view of the testimony relating to insurance on page 243 of the Transcript. This Appellee was absolved of all liability by the verdict of the jury, given after proper instructions as to "scope of employment" (App. 109).

It should be noted that the evidence relating to the support of Appellee Liner's mother, covered in Part 3 of Appellant's Brief, is not listed in the Statement of Points indicated on Page 4 of Appellant's Brief, and according to Rule 17(i) of the *General Rules of the United States Court of Appeals for the District of Columbia Circuit*, should be disregarded by this Court. Nevertheless, affirmatively speaking, at the time the evidence indicating support of Appellee Liner's mother was introduced, the Court had not instructed the jury as to the measure of damages, and at that time there was pending in the court a suit for punitive damages. In suits for punitive damages, the financial position of the defendant is put in issue, and on this ground the corporate Appellee feels that the Court did not err in allowing such testimony. See *Brown v. Evans*, 17 Fed. 912.

Nevertheless, this Appellee takes the position that the evidence objected to was harmless and not prejudicial. In a sense, Liner's reputation for peace and good order is definitely brought into the picture because he has been accused of a violent and unprovoked assault. But even assuming it was not, this Appellee feels the point was raised and covered recently in the case of *Boyle v. Smith*, 64 A (2d) 428, wherein at page 431, the Municipal Court of Appeals for the District of Columbia said:

"Since this testimony was offered as character evidence it was inadmissible because plaintiff's good character had not been put in issue. But we think its admission cannot be held prejudicial to defendant. It went very little further than the concession of defense counsel which preceded it. And in view of the large amount of testimony supporting the plaintiff on the main issues this evidence could hardly have tipped the scales adversely to defendant. Assuming that the testimony was erroneously admitted it must still be regarded as harmless because 'upon an examination of the entire record, substantial prejudice does not appear'."

The above case is applicable to the case at bar. Certainly if this evidence was erroneously admitted it is not prejudicial. The case was fully tried on the merits for three full days, and this minor bit of testimony could not have possibly influenced the jury against the Appellant. There was ample evidence to justify the jury's verdict on the merits, and it is respectfully submitted that the admission of this evidence is not prejudicial or reversible error. It obviously could not have influenced the jury in returning the verdict in favor of the Appellee, T. F. Schneider Corporation.

Exception is taken to the statement appearing on page 12 of Appellant's Brief, to the effect that "it is in effect admitted that the beating took place," and also to the assertion on page 16 of the Brief that, "The beating is not only proved, but is admitted." Appellee Liner has steadfastly denied that he hit or beat Appellant (App. 94). Liner says he only grabbed his shirt in self-defense. It is significant to note that Meder, Appellant's witness, was standing right in front of the parties at the time of the so-called altercation (App. 61), yet he didn't see any beating or hits. All he saw was, "Mr. Liner approached Mr. Ersler and grabbed him by his collar." (App. 57). Appellant further contends that Liner followed him to the elevator and tried to pull him off (App. 12), yet Meder testified

that Liner did not go to the elevator, and Cyril Stephen Nelson, the elevator operator, also testified that Liner did not follow Appellant to the elevator, and that no incident occurred on the elevator (App. 86). Nelson further testified that the only complaint Appellant had after the fight was a tear in his shirt (App. 86), and that Appellant has never said anything to him about being injured or struck by Mr. Liner.

3. The Court Did Not Err in Ruling that Punitive Damages Did Not Apply to the Appellee T. F. Schneider Corporation in this Case.

The T. F. Schneider Corporation was sued as employer and principal of the defendant Liner. At all times the corporate defendant has denied that the individual defendant was acting within the scope of his employment or in the furtherance of his employer's business at the time of the alleged altercation. The Answer of the corporate defendant (App. 3) stated in part:

"Further answering said paragraph four, this defendant says that at the time of the happening of the alleged assault the defendant Liner was not on duty, was not acting as servant, agent or employee of this defendant, as alleged; that defendant Liner was acting without authority and outside the scope of his employment by this defendant."

At the Pretrial Proceedings the corporate defendant reiterated this position (App. 5) in the following language:

"Defendant corporation claims that time of occurrence of acts relied on by plaintiff, defendant Liner, while in employment of defendant as a desk clerk, was off duty and not engaged in any business of defendant."

It has been the contention of this Appellee throughout these proceedings that the Appellee Liner was not on duty at the time of the incident and that he was not acting

within the scope of his employment or in the furtherance of his employer's business. Appellant admitted at the trial that another clerk (Meder) was on duty at this time and that "Mr. Liner and Mr. Roper and a Mr. O'Day came off the elevator" (App. 11).

An examination of the testimony of Cecil Jerome Meder, Appellant's own witness (App. 54-63), shows that he was the night clerk on duty from 12 midnight to 8 in the morning at the time of the alleged assault and that Appellee Liner came into the lobby and that he was not on duty.

One glaring error in Appellant's Statement of the Case, appearing on Page 2 of his Brief, should be pointed out. All evidence was conclusive that Appellee Liner was a room clerk at the Cairo Hotel, yet Appellant refers to him as "night auditor", obviously a term calculated to lend more dignity to his job and infer supervisory or personnel powers. In support of this title, Appellant refers the Court to page 90 of the Joint Appendix. When we look at that page we see the following colloquy between Liner and his attorney at the time of the trial, showing that at that time Liner was employed as night auditor at the Wardman Park Hotel, but the other testimony shows that at the time of the alleged assault Liner was employed as night clerk at the Cairo Hotel:

"By Mr. Brick:

Q. Mr. Liner, at the present time where are you employed?

A. Wardman Park Hotel.

Q. What position do you hold at the Wardman Park Hotel?

A. Night Auditor.

Q. How long have you been employed at the Wardman Park Hotel?

A. Since July 1, 1948.

Q. How long have you been doing hotel clerical work?

A. Ever since I got out of the Service in '44."

Appellee Liner testified that at the time of the alleged assault he went off duty "about twenty minutes to twelve because Mr. Meder came in early and relieved" him (App. 92), and further that he had been out drinking beer and eating and returned after 2:00 P. M. only to get a suit out of a friend's room, parking his car out front while he went up (App. 92, 93, 98).

Mr. Scott Stillson, who was manager of the hotel at this time, testified that Appellee Liner was an employee of T. F. Schneider Corporation and a room clerk and when working the shift from 4 to 12 was off duty after midnight and was free to leave (App. 81). Appellant, himself, testified that he returned to the hotel "around 2 o'clock, 2:15, maybe 2:30" (App. 29) and that this incident occurred about twenty minutes after he returned (App. 11).

This Appellee contends the correct rule of law in cases of this type is laid down by the United States Supreme Court in *Lake Shore & M. S. Ry Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97, 13 Sup. Ct. 261. This rule is as follows:

"Exemplary or punitive damages, being awarded not by way of compensation to the sufferer, but by way of punishment of the defender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course, liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent."

The rule of the Lake Shore Case has been cited favorably and followed by the United States Court of Appeals for the District of Columbia on numerous occasions, such as *A. S. Abell Co. v. Ingham*, 43 App. D. C. 582, and *Aetna Life Ins. Co. et al. v. Brewer*, 56 App. D. C. 283, 12 F (2d) 818. In the latter case, after citing the Lake Shore Rule, this court went on to say:

“The better rule on this subject seems to be that a principal will not be held liable in exemplary damages for the act of an agent, unless it be shown that he authorized or approved of or participated in the wrong of which his agent has been guilty, or that he has not exercised proper care in selecting his servants. 13 Cyc. 114.”

It is significant to note a portion of the citation from *Wardman-Justice Motors, Inc. v. Petrie*, 59 App. D. C. 262, 39 F (2d) 512, appearing on page 15 of Appellant's Brief:

“ . . . To hold a corporation liable, it must appear that the trespass was committed by a servant acting within the scope of his employment, *and* that the servant's act was either authorized or ratified by officers of the corporation having authority to speak for it.”
(Italics added)

There is absolutely no evidence of any ratification subsequent to the alleged assault. On the contrary, all evidence is clear that following this incident the manager of the corporate Appellee learned of the incident and advised the Appellee Liner to apologize to the Appellant (App. 96), which he did. Other than reporting the incident the next day, never did Appellant mention it again to anyone connected with the corporate defendant (App. 62, 83, 87) nor to the Appellee Liner (App. 96). All parties concerned, even Appellant's witness, Meder, understood this to be a minor incident (App. 59, 83, 96), and after Appellee Liner apologized, a closed issue (App. 96). It should be noted that on May 23, 1948, two months and one day after the incident, the corporate Appellee leased the hotel to a third party and ceased operation thereof (App. 88). This was, of course, before the suit was filed (App. 1).

The question as to whether Appellee Liner was “acting within the scope of his employment” at this time is clearly a question of fact and was submitted to the jury, under proper instructions (App. 108, 109). By its verdict, the jury obviously made a finding that he was not. See *M. J.*

Uline Co., Inc. v. Cashdan et al., 84 App. D. C. 58, 171 F (2d) 132.

Again, even assuming the trial Court was in error, under this Court's ruling in *Underwood v. Capital Transit*, — App. D. C. —, — F (2d) —, No. 10265, decided May 29, 1950, the error, if any, would not be prejudicial since it goes to damages, whereas the jury found for Appellees on the issue of liability.

The real complaint in this appeal is not that the verdict was inadequate or that the jury did not grant a sum of money sufficient to compensate for damages suffered. The complaint is that the jury returned no verdict for Appellant at all.

4. The Verdict of the Jury Was Not Contrary to the Evidence, the Weight of the Evidence or Contrary to Law.

During the trial of the case here appealed, the jury was able to evaluate the evidence as adduced, observe the demeanor of the witnesses, and view the physical condition of the plaintiff. The jury heard Appellant's vague attempts to prove that he was employed somewhere, but with the exception of about two years with the Government he never stated where or when he ever had a job. The jury heard portions of Appellant's deposition where he testified under oath that he was a "stock market trader" (App. 17), and they heard Appellant testify that, after the alleged assault, he still went to Hibbs every day (App. 17). The jury heard Appellant list stocks from twelve corporations that he had sold since March 22, 1948 (App. 21); heard him list the stocks of nine corporations on his account at Hibbs; and heard him list the stocks of five corporations owned by him and not on his account at Hibbs, with the added explanation that "there may be more or less", and that he would have to consult his records on that. (App. 22).

The jury heard Appellant testify that he consulted a lawyer first, and then a doctor, eighteen days after the incident complained of (App. 28). They heard Appellant

testify on trial that there was "an awful stinging blow on the right side of my face", and they heard a portion of Appellant's deposition taken on December 17, 1948, wherein he stated (App. 26):

"... he suddenly reached over and grabbed the pipe which I had clenched in my right side very fast. I was astonished. I mean it was just like lightning hit me, and he wrenched it out of my mouth and threw it behind the counter. I guess my jaw dropped, I was so surprised. It was so fast and whatnot. It caused a little pain. I was very astonished at the moment. *It was just like a blow.*" (Italics added.)

The jury heard Appellant's witness, Meder, testify that he "didn't pay too much attention to the whole fracas, actually. It didn't seem very important to me." (App. 59), and further that Appellant never mentioned to him about being injured in any way as a result of the incident (App. 62, 63). They heard the Manager of the Cairo Hotel testify that Appellant never made any complaint about having received any injury in the altercation (App. 83).

The jury heard Appellant's own doctors testify that he was suffering from "hypochondriasis" (Tr. 89, 137) and had no physical basis for his complaints (App. 46), which diagnosis was borne out by Appellee's expert witness, Dr. Oscar Hugh Fulcher. The jury heard Appellee's expert witness, Dr. Harold Stevens, testify that Appellant's "neurotic symptoms preceded the incident."

The jury heard all this, and more, during three days of testimony and, after due deliberation, decided that the incident had been exaggerated beyond all proportion to reality.

Appellee T. F. Schneider Corporation submits that there is more than ample evidence of record to support the verdict of the jury, and certainly feels that the verdict was not contrary to the law, particularly in reference to the corporate Appellee.

CONCLUSION.

The appellee T. F. Schneider Corporation respectfully submits that the trial court did not err in excluding or allowing testimony and that the verdict of the jury is supported by the evidence and is not contrary to law.

Respectfully submitted,

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